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November 22, 2000
George Bush Appeals to U.S. Supreme Court on Florida Supreme Court New Deadline and Constitutionality of Manual Recounts

No.

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court of Florida has held that the Secretary of State cannot certify election results in accordance with preexisting Florida law and must instead wait for the statutorily untimely results of manual recounts conducted in three Florida counties before certifying the results of the November 7, 2000 presidential election. This holding raises three substantial federal questions that warrant immediate review by this Court:

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

3. Whether the use of arbitrary, standardless, and selective manual recounts that threaten to overturn the results of the election for President of the United States violates the Equal Protection or Due Process Clauses, or the First Amendment.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Governor George W. Bush, as candidate for President; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, as members of the Elections Canvassing Commission; Matt Butler; Palm Beach County Canvassing Board; Broward County Canvassing Board; Broward County Supervisor of Elections; Robert A. Butterworth, as Attorney General, State of Florida; Florida Democratic Party; and Vice President Albert Gore, Jr., as candidate for President.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner George W. Bush, the candidate of the Republican Party for the office of President of the United States, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Florida in this case. In plain contravention of the requirements of the Constitution of the United States and federal law, the state supreme court has embarked on an *ad hoc*, standardless, and lawless exercise of judicial power, which appears designed to thwart the will of the electorate as well as the considered judgments of Florida's executive and legislative branches. Because the selection of presidential electors is governed directly by the Constitution and congressional enactments, as well as by state law, the court's decision involves issues of the utmost *federal* importance.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App., *infra*, 1a-39a) is not yet reported. The orders of the Circuit Court of the Second Judicial District for the County of Leon, Florida (App., *infra*, 43a-44a & 45a-51a) are not reported.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 21, 2000. The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

The decision below compels the Florida Secretary of State and Elections Canvassing Commission to accept, and include in the State's certification of election returns, untimely election results derived from selective manual recounts being conducted in certain Florida counties. App., *infra*, 42a. The judgment below is therefore "final" for purposes of this Court's jurisdiction under §1257; indeed, it amounts to the entry of a per-

manent injunction against the responsible state officials. *Market Street Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945) (entry of injunction is "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein").

As demonstrated *infra*, petitioner expressly raised below the federal questions presented in this petition. Accordingly, the Florida Supreme Court's failure to address petitioner's federal claims, and its assertion that "[n]either party has raised as an issue on appeal the constitutionality of Florida's election laws" (App., *infra*, 11a, n.10), is no barrier to review by this Court. "The issue of whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583 (1969). *See also Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956) (this Court has a "duty to . . . determine for ourselves precisely the ground on which the judgment rests"). Accordingly, a state court cannot evade this Court's review by failing to discuss federal questions in its opinion. *Chapman v. Goodnow's Adm'r.*, 123 U.S. 540, 548 (1887) ("If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right . . . as if it has been specifically referred to and the right directly refused.").

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 3, Section 5 of the United States Code provides: "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been

made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5.

Article II, Section 1, Clause 2 of the Constitution provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law … abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Pursuant to this Court's Rule 14.1(f), the provisions of Florida election law involved in this case, including Fla. Stat. §§ 102.111, 102.112, 102.141(4), 102.166, 102.168, and 106.23, are set forth at App., *infra*, 52a-61a.

STATEMENT OF THE CASE

On Tuesday, November 7, 2000, the citizens of the several States, including Florida, cast their votes for the electors for the President and Vice President of the United States. An initial count of the ballots cast in Florida showed that Governor George W. Bush and Dick Cheney received the most votes in the election, subject to the counting of absentee ballots. Because the margin of victory was less than .5 percent, however, an automatic statewide recount commenced. *See* Fla. Stat. § 102.141(4). The automatic statewide recount confirmed that Gov. Bush and Secretary Cheney received the most votes. The absentee ballots have now been counted, and Gov. Bush and Secretary Cheney again have received the most votes. Nonetheless, the outcome of the Florida election has not been certified, and the American people are still uncertain as to who their next President will be. Petitioners have no choice but to seek this Court's intervention.

I. The Underlying Litigation

Once election results had been tabulated in most of the other states in the union, it became apparent that the victor in the State of Florida would almost certainly be the next President of the United States. Dissatisfied with the results of the initial count and the automatic recount, officials of the Democratic Party filed requests for manual recounts in four selected Florida counties: Broward, Miami-Dade, Palm Beach, and Volusia Counties. In each of these counties, Vice President Gore had received a substantial majority of the votes cast in the election.

As this Court is undoubtedly aware, the chaos that erupted in the wake of these selectively focused requests for manual recounts has been striking. Unrestrained by statutory guidance, the counties have embarked upon various paths in attempting to divine the "intent of the voters." Counties have adopted conflicting guidelines

for achieving this goal, and have repeatedly changed guidelines and standards in the midst of the recounting process. The widely varying and inconsistent policies (or lack of policies) underscores the absurdity of the purported objective of a manual recount conducted under these conditions. A manual recount in selected limited counties without consistent standards according to guidelines that are constantly changing and where subjective judgments are being exercised by persons who know that their decisions may alter the results of the presidential election will not yield a more accurate tabulation than the original statewide machine count, it will simply undermine the credibility and integrity of any final result.

The manual recount process has also undermined the physical integrity of the voters' ballots. Ballots have been damaged throughout the manual recount process by being twisted, rumpled, creased, and dropped; some have been stained with ink, poked with pens, and crushed. This aggressive, careless treatment of the ballots has apparently changed their original character in that chads, still attached after voters cast the ballots, have been dislodged in bunches, littering the floor of the recount rooms. It has become impossible to determine the actual condition of the ballots as they appeared when they were cast in the November 7 election in the specified counties.

The chaos and confusion over the manual recount process has triggered numerous legal actions. Two of those legal actions reached the Florida Supreme Court and are the subject of this petition.

A. The Recount Authority Litigation

One lawsuit at issue involves the authority of the selected counties to conduct a manual recount of the votes cast on November 7. This proceeding centers on a request by the Palm Beach County Canvassing Board, which asked whether an "error in the vote tabulation"

under Florida election law (Fla. Stat. § 102.166(5)), which was the statutory condition precedent for the exercise of the authority to initiate manual recount proceedings, referred to errors in the tabulation system itself or, more broadly, included discrepancies between the number of votes determined by the tabulation system and a sample manual recount. Exhibits A and B, attached to Palm Beach County Canvassing Board's Emergency Petition For Extraordinary Writ in case number SC00-2346.

In response to the Palm Beach request, the state Division of Elections, the State office charged by the legislature with responsibility for interpreting Florida election law, Fla. Stat. § 106.23, issued an opinion that manual recounts are not authorized unless the County Canvassing Board concludes that "the vote tabulation system fails to count . . . properly punched punchcard ballots." Exhibit C, attached to Palm Beach County Canvassing Board's Emergency Petition For Extraordinary Writ in case number SC00-2346. The opinion continued that "unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county. . . ." *Id.* The following day Florida's Attorney General issued an advisory opinion on the same issue that contradicted the Division of Election's advisory opinion. Exhibit D, attached to Palm Beach County Canvassing Board's Emergency Petition For Extraordinary Writ in case number SC00-2346.

In response to these conflicting opinions from the Florida executive branch, the Palm Beach County Canvassing Board filed a pleading with the Florida Supreme Court in which it asked the court to resolve the conflict.

B. The Recount Certification Litigation

The second legal proceeding relevant to this petition arose out of the Florida statutory deadline for certifying election results, which by law is set for 5:00 p.m. on the seventh day after the election, *i.e.*, Tuesday, November 14. Fla. Stat. § 102.111(1).[1] After a Florida Circuit Court enjoined the Secretary of State from declaring that all manual recounts had to be completed by the statutory deadline and directed her to exercise her discretion to determine whether to include untimely election returns in her certification of the election results, the Secretary asked counties interested in submitting explanations for extending the deadline to do so by 2:00 p.m. on Wednesday, November 15. FDEC App. 5, Ex. E.[2] After receiving submissions from four counties (FDEC App. 5, Ex. O), the Secretary of State exercised her discretion and concluded that insufficient reasons had been given to justify extending the deadline to include the results of manual recounts not yet complete. FDEC App. 5, Ex. H.

Vice President Gore and others sued for an order directing the Secretary to waive the statutory deadline and allow late results from three counties—Broward, Miami-Dade, and Palm Beach—to be included in the final vote tally. FDEC App. 12. On November 17, after a hearing the previous afternoon, the Circuit Court for Leon County issued its decision denying the motion. FDEC App. 13. The court held that the Secretary of State had not violated its November 14 Order and explained that

[1] Volusia County submitted its manual recount results before the 5:00 p.m., November 14 deadline and, therefore, is in a different category than the other three counties.

[2] "FDEC App." refers to the Appendix to the Initial Brief filed on behalf of Albert Gore, Jr., and the Florida Democratic Executive Committee in the court below.

"the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision." App., *infra*, 44a.

II. Proceedings In The Florida Supreme Court

The Supreme Court of Florida consolidated the two cases discussed above: (a) the original action brought by the Palm Beach County Canvassing Board asking the court to resolve the conflicting advisory opinions issued by the Division of Elections and the Attorney General; and (b) the appeal from the Leon County Circuit Court's decision that the Secretary of State had not abused her discretion in deciding not to include results from manual recounts filed after the 5:00 p.m. November 14 deadline in the statewide tabulation.

A. The State Court's Decision

On Friday, November 17, 2000, the Florida Supreme Court *sua sponte* enjoined the Secretary of State from certifying the November 7 presidential election results for the State of Florida until further order from the Court. App., *infra*, 40a-41a. On Monday, November 20, after weekend briefing by the parties, the court heard oral argument.

Late on the evening of November 21, 2000, the Florida Supreme Court issued its opinion reversing the orders of the state trial court. App., *infra*, 1a-39a. The supreme court held that the trial court "erred in holding that the Secretary [of State] acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts." App., *infra*, 35a. The supreme court reached this conclusion by announcing a new rule of law to constrain the Secretary's discretion under Fla. Stat. §§ 102.111 and 102.112, declaring for the first time that "the Secretary may reject a Board's amended returns only if the returns are submit-

ted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." *Id.* at 37a. Based on this newly fashioned, hitherto unrecognized rule of law, the Florida Supreme Court directed the Secretary of State to accept untimely manual recount returns through Sunday, November 26, 2000. *Id.* at 38a-39a. Moreover, the court maintained its injunction preventing the Secretary from certifying any election results by that date, and directed the Secretary to include in her certified election results all manual recount returns received by that date. *Id.* at 39a.

B. The Federal Issues Were Raised And Ruled On Below

Each of the issues presented by this petition was expressly raised in the court below. *First*, petitioners argued that a *post hoc* judicial decision on the appointment of electors would violate 3 U.S.C. §5, which requires that any such disputes be resolved in accordance with laws enacted prior to election day. Bush Answer Br. 42-43; App., *infra*, 62a. *Second*, petitioners contended that any decision overriding the Florida legislature's procedures for appointing electors (including the November 14 deadline for certifying votes) would violate Article II, which vests sole authority over such matters in the legislatures of the several States. Bush Answer Br. 43 n.15; App., *infra*, 62a-63a, n.15. And *third*, petitioners argued that the manual recount being sought by the Gore faction would "violat[e] the United States Constitution," by diluting votes in violation of the Due Process and Equal Protection Clauses, by allowing standardless decision-making in the voting arena in violation of the Due Process Clause, and by impairing the right of association through voting in violation of the First Amendment. Bush Answer Br. 43-44; App., *infra*, 63a-64a.

As noted above, the Supreme Court of Florida did not expressly rule on petitioner's federal claims. Be-

cause the judgment below necessarily rejects those federal claims on the merits, however, those federal questions are squarely presented here.

REASONS FOR GRANTING THE PETITION

Few issues could be more important than those presented in this case. At stake is the lawful resolution of a national election for the office of President of the United States. As this Court has often recognized, the American public's right to vote is one of the most sacred protected by our Constitution: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). The Florida Supreme Court's decision poses a clear and present danger to that right, and should be corrected forthwith to ensure that our Nation continues to be governed by the rule of law.

The choosing of presidential electors is a matter of great national importance and interest. As this Court stated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Id.* at 794-95. Given the national significance of the Florida election results, it is essential that the counting of ballots be conducted in a fair and consistent manner in accordance with established Florida law. Counties in Florida, however, have undergone a blatantly arbitrary, subjective, and standardless process in attempting to count ballots by hand in an effort to divine the intent of the vot-

ers. The Nation's citizens have witnessed this standardless process unfold as they anxiously await a resolution of the election outcome. By retroactively changing the law in Florida through judicial intervention, the Supreme Court of Florida's decision preventing the Secretary of State of Florida from exercising her legislatively conferred authority to perform the act of certification that would complete the electoral process in Florida has added to that angst and has strayed from established federal constitutional and statutory law.

Governor George W. Bush and Dick Cheney received the most votes cast in Florida, as initially counted, as recounted, and as retabulated again after receipt of overseas ballots. Nevertheless, the Secretary of State of Florida has been precluded from certifying these results or appointing electors in accordance with that popular vote, pending the completion of an arbitrary, standardless and selective manual recount of ballots cast in three heavily populated, predominantly Democratic counties in Florida.

This Court's review of the Supreme Court of Florida's decision is warranted because it "decided an important federal question that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c); it "decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals," Sup. Ct. R. 10(b); and it "decided an important question of federal law that has not been, but should be, settled by this Court" Sup. Ct. R. 10(c). As discussed in greater detail below, this case presents important questions regarding the federal statutory and constitutional restraints on the ability of States to impose *post hoc* requirements on the appointment of presidential electors, and to change requirements for the resolution of controversies concerning the appointment of electors. The decision below also conflicts with precedents of this Court and the court of appeals regarding the scope of the First and Fourteenth Amendment protections for the funda-

mental right to vote. Moreover, these important questions are presented in the context of one of the closest elections for President in our Nation's history.

There is a profound national interest in ensuring the fairness and finality of elections, particularly an election for the highest office in the land. This is precisely the type of question that the Nation justifiably expects this Court to decide. Indeed, absent a decision by this Court, the election results from Florida could lack finality and legitimacy. The consequence may be the ascension of a President of questionable legitimacy, or a constitutional crisis. Quite simply, this is the sort of case that this Court should unquestionably hear.

I. Review Is Warranted In This Case Because The Florida Supreme Court Disregarded Federal Law Governing Disputes Over The Appointment Of Electors

Although election procedures are often governed exclusively by state law, that is not the case in elections for the members of the Electoral College, who choose the President and Vice President of the United States. While some of the details of appointing presidential electors are left to the several States, the basic framework is established by the Constitution itself, in Section 1 of Article II and the Twelfth Amendment. Moreover, Congress has enacted legislation to implement the constitutional framework, and those federal laws, of course, reign supreme over state laws in this area. U.S. CONST., art. VI, cl. 2.

In particular, Congress has provided that when "any controversy or contest concerning the appointment of all or any of the electors" from a State arises, the dispute must be resolved exclusively by reference to "laws enacted *prior to*" election day. 3 U.S.C. §5 (emphasis added). The evident purpose of this federal law is to ensure that the applicable rules cannot be changed once the voters have gone to the polls. As Representative Wil-

liam Craig Cooper of Ohio explained in the congressional debate on this provision (Act of Feb. 3, 1887, ch. 90, § 2, 24 Stat. 373), "these contests, these disputes between rival electors, between persons claiming to have been appointed electors, should be settled under a law made prior to the day when such contests are to be decided." 18 CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper); *see also id.* ("these contests should be decided under and by virtue of laws made prior to the exigency under which they arose"); *id.* ("How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?"). Representative Cooper's concerns, although expressed more than a century ago, seem remarkably prescient when read against the backdrop of events of the past fifteen days in Florida. As he asked rhetorically, in opposing the views of congressional Democrats who wished to permit the use of retroactive rulemaking to resolve electoral disputes: "To what anarchy, to what confusion, to what riot, if you please, Mr. Speaker, might such a course of procedure lead!" *Id.*

Despite the express federal statutory prohibition against the *post hoc* creation of new legal rules to affect the outcome of controversies over the appointment of presidential electors, the Supreme Court of Florida has authorized a clear departure from the established legal requirements set forth by the Florida Legislature that were in place on November 7. Prior to election day 2000, the Florida Legislature had enacted clear legislative directives regarding the certification of votes cast in the Presidential election. Under § 102.111 of the Florida Statutes, for example, election returns by county canvassing boards "must be filed by 5:00 p.m. on the 7th day following the . . . general election" By contrast, under the new rule of law announced by the decision below, the effective deadline for submission of election returns has been extended from November 14

until November 26 (App., *infra*, 37a), nearly tripling the statutory seven-day time period mandated by the Florida Legislature.

In addition, §102.112 of the Florida Statutes provides that the Elections Canvassing Commission "shall . . . ignore[]" county returns filed after 5:00 p.m. on the seventh day following the election, and "shall . . . certif[y]" the election based on the results returned before the deadline. Section 102.111(1) confirms that late-filed returns "may be ignored" by the Elections Canvassing Commission.[3] *See* Fla. Stat. §102.112. Notwithstanding this clear, and preexisting, legislative directive, the Supreme Court of Florida has now concluded retroactively that the Elections Canvassing Commission could

[3] Section 102.112(1) of the Florida statutes provides that if election returns are not received by the Department of State by 5:00 p.m. on the seventh day following the election, the returns "may be ignored." This statute, enacted in 1989, appears to have been passed in response to the Supreme Court of Florida's decision in *Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988). In *Chappell*, one of the six counties in the Fourth Congressional District failed to submit its original certificate until two days after the statutory deadline in § 102.111. The county had, however, informed the Department of State by telephone of its results prior to the deadline. The supreme court ruled that the county had substantially complied with § 102.111 and thus allowed the county's votes to count. *See Chappell*, 536 So. 2d at 1008-09. In passing § 102.112, however, the State Legislature did not repeal § 102.111. Nor does this case involve a situation like that at issue in *Chappell*, in which a county conducting a recount informed the Department of State of its results prior to the deadline, but simply failed to submit its official results in writing by the deadline. In any event, as discussed below, § 102.112 states that late results *may* be ignored, not that such results *may not* be ignored, as the Florida Supreme Court has now directed.

not ignore late-filed returns, but *must* hold the results of a national election open for an additional extended period of time, pending the completion of selective manual recounts in individual counties. App., *infra*, 34a-37a.

In addition, the judicially established waiver of the statutory deadline contained in § 102.112, is contrary to the legislative provisions contained in § 102.168 providing for contests to election results. *See* Fla. Stat. § 102.168. That statute clearly anticipates that results will be certified in a timely fashion, in order for the results to be contested in court. Pushing back the deadline for certification by judicial fiat thus runs headlong into the Florida Legislature's intent to allow a period of time for court challenges.

The Supreme Court of Florida's decision also deviated from its prior decisions making clear that the "judgments" of officials such as the Secretary of State in fulfilling their specifically charged duties in the election process "are entitled to be regarded by the courts as presumptively correct." *Krivanek v. The Take Back Tampa Political Comm.*, 625 So. 2d 840, 844 (Fla. 1993) (quoting *Boardman v. Esteva*, 323 So. 2d 259, 268 n.5 (Fla. 1975)); *see also Greyhound Lines, Inc. v. Yarborough*, 275 So. 2d 1, 3 (Fla. 1973) ("This Court has often reiterated the principle that a construction of a statute by the administrative body in whom authority to administer is reposed is entitled to great weight and should not be overturned unless clearly contrary to the language of the statute."). This arbitrary judicial departure from the well-established law of Florida—as it plainly stood prior to November 7, 2000—is in flagrant violation of Congress's federally imposed requirement that controversy over the appointment of electors be resolved solely un-

der legal standards "enacted prior to" the date of the election. 3 U.S.C. § 5.[4]

Even if the Secretary of State *might* be authorized to excuse county board noncompliance with the 5:00 p.m. November 14 deadline (*see* Fla. Stat. §102.112), nothing in Florida law as it existed before November 7, 2000, *required* that she do so, and certainly there was no preexisting rule of Florida law that mandated that result in the circumstances presented here. The Florida Legislature directly contemplated close elections when it enacted the controlling statutory provisions at issue here. Indeed, the State's legislative body required that when the margin of victory in an election is less than .5 percent, an automatic statewide recount is to be held. *See* Fla. Stat. § 102.141(4). The Florida Legislature also contemplated that manual recounts might be requested by candidates or parties (but not by voters) in some circumstances, but established no standards to guide the discretion of county canvassing boards in determining whether to conduct such manual recounts *See* Fla. Stat.

[4] The Supreme Court of Florida purported to follow prior Florida case law in reaching its decision but that claim is manifestly without foundation. Under 3 U.S.C. § 5, of course, this Court has an independent obligation to ensure that Florida resolves any controversies over appointment of electors by reference to the rules of law enacted prior to the election, not *post hoc* standards announced for the first time some two weeks after the election. Moreover, this Court has repeatedly recognized that when a state court rests its decision on a nonfederal ground that "is so plainly unfounded that it may be regarded as essentially arbitrary," such action does not remove consideration of the federal question from this Court's jurisdiction. *See McCoy v. Shaw*, 277 U.S. 302, 303 (1928); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 454-55 (1958).

§ 102.166(4)(c). In passing §§ 102.111 and 102.112, however, the legislature plainly determined that finality had an important place in the certification process as well.

The Florida Legislature thus consciously weighed the interests of finality against competing interests supporting manual recounts. It is clear from the legislative enactments that the court struck the balance between finality and manual recounts in such a way that ongoing manual recounts do not warrant abandoning the statutorily imposed deadline found in §§ 102.111 and 102.112, unless, in the most permissive reading of the statutes, the Secretary of State decides in her lawfully granted discretion that such late-filed returns should be included in the final election results. Where, as here, no preexisting rule of law required (or even authoritatively authorized) the Secretary of State to waive the time limit on the facts presented, 3 U.S.C. § 5 precludes the retroactive enforcement of a new rule of law compelling that previously unknown result.

The federal rule enunciated by Congress in 3 U.S.C. § 5 serves obvious and important public policy interests by prohibiting precisely what is happening in Florida today, where the candidate who did not receive the most votes and his supporters are attempting to overturn the results of the Presidential election by changing the rules after the election has been held. Section 5's prohibition against such retroactive rulemaking in the election context provides a statutory corollary to the principle of federal constitutional law recognized by the Eleventh Circuit in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). As the court of appeals held in that case, constitutional principles of due process and fundamental fairness preclude the States from adopting "a post-election departure from previous practice" and applying that post-election rule retroactively to determine the outcome of an election. *Id.* at 581. Here, as in *Roe*, "had the candidates . . . known" that the state supreme court would retroactively

extend the deadline for submission of election returns notwithstanding the plain language of the governing statutes, "campaign strategies would have taken this into account" *Id.* at 582. Indeed, the candidates' decisions whether to seek a manual recount in specific additional counties might well have been affected had petitioner and other candidates known that the Florida Supreme Court would subsequently extend the statutory deadline nearly threefold.

The application of 3 U.S.C. § 5 in these circumstances is straightforward. Perhaps because no candidate has previously resisted so strenuously and resourcefully, the certification of election results as has Vice President Gore, this Court has not previously been called upon to decide whether or not the States must adhere to preexisting law in resolving election disputes. But the plain language of the federal statute indicates that they *must* do so, and it is also plain that the Florida Supreme Court failed to do so. Given the importance of the issue to the Nation, this is not a question that can await further development in the lower courts. The Court should decide—now—whether or not Congress meant what it said when it directed that controversies concerning the appointment of electors be decided only "by laws enacted prior to" election day. 3 U.S.C. §5; *see* Sup. Ct. R. 10(c) (including among the considerations supporting review in this Court, state court decisions that decide "an important question of federal law that has not been, but should be, settled by this Court"). If Congress did, then the judgment below must be reversed.

II. Review Is Warranted Because The Court Below Disregarded Constitutional Limitations On The Appointment Of Electors

The congressional directive that States decide controversies concerning electors according to "laws enacted prior to" election day (3 U.S.C. §5) is derived from the constitutional command that each State appoint

electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2. Significantly, the Framers did not see fit to leave the mechanics of electoral appointment to either the judicial or executive branch of the several States, but instead entrusted the legislative arm—the one, as in the federal government, most representative of the popular will—with authority to articulate the standards by which electors would be chosen.

In Florida, the "manner" in which the legislature has directed that electors be appointed is quite clear. The citizens vote for them on Election Day (which is established by federal law), and the various counties must certify the results of the election to the state Division of Elections by 5:00 p.m. the following Tuesday. Fla. Stat. § 102.112. As soon as practicable thereafter, the legislature has commanded that the results of the election "shall" (or at least "may") be certified, while the results from any counties not reporting before the statutory deadline "shall" (or, again, at least "may") be ignored. Fla. Stat. §§ 102.111, 102.112. Notably, the creation of this timetable intentionally leaves time for election contests, as the legislature clearly provided for in § 102.168. Under this legislative directive, the results in Florida—as all acknowledge—are clear: The electors for the Republican candidates garnered more votes before the statutory deadline, and that outcome did not change when the results of absentee balloting (which, under federal law, must be counted notwithstanding the state deadline) were considered.

The Florida Supreme Court has seen fit to revise the "manner" in which Florida's electors are chosen by directing the Secretary of State to consider results from those counties that are conducting manual recounts, notwithstanding the fact that the statutory deadline has long since passed and no waiver of that deadline has been granted by the State agency authorized by the legislature to grant such relief: the Elections Canvassing

Commission. The Constitution admits of no such *post hoc* alterations to the scheme of electoral appointments. Had the Florida legislature seen fit to vest the decision in the hands of the judiciary, presumably it could have done so; but the simple fact is that it did *not* do so.

It is no accident that Article II reserves the manner of selecting electors to the *legislatures* of the several States. As this Court has explained, "[t]hat was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purposes of interpretation. A Legislature was then the representative body which made the laws of the people." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And then, as now, a legislature was *not* a state court, sitting after the fact to decide what rules should be adopted and applied. Rather, by requiring the legislative branch to set forth the manner in which electors would be chosen, the Framers undoubtedly wanted to ensure that the rules would be specified in advance in order that there could be no doubt that their application in particular circumstances was reflective of the will of the people. The events in Florida have only confirmed the wisdom of the constitutional design, faithful adherence to which requires that this Court review the Florida Supreme Court's usurpation of legislative power in defiance of the Constitution's plan.

III. Review Is Warranted Because The Supreme Court Of Florida's Decision Conflicts With This Court's And Eleventh Circuit Precedent And The Recount Procedures Sanctioned By The Court Below Do Not Pass Constitutional Muster

The Florida Supreme Court's decision opens the door to an electoral catastrophe. The court below has essentially given the green light to a standardless exercise in which vote-counters in a few, carefully selected counties will divine the "intent of the electorate" without

any legislative guidance or uniform standards. The process therefore varies from county to county, and criteria for counting ballots as votes has changed repeatedly in each recount county. Voters in counties not selected for recount will have ballots tabulated pursuant to wholly different, less permissive standards. The results of such lawlessness cannot be squared with fundamental principles of our constitutional structure.

When it became apparent that some Florida officials were bent on paving the road to chaos that the state supreme court has now endorsed, Governor Bush and Secretary Cheney, and various Florida voters, sought an injunction in federal court. Both the district court and the court of appeals denied their request for an interlocutory injunction, although the appellate court did not foreclose the possibility of appropriate relief if necessary. Petitioner Bush, among others, has petitioned this Court for review of the federal case (*Siegel v. LePore*, No. 00-___, filed contemporaneously herewith), which raises the same fundamental due process and equal protection constitutional questions as does the Florida Supreme Court's decision. Since those questions are addressed more fully in that petition, which is being submitted to the Court concurrently with this one, Petitioner will only summarize the constitutional problems here.

A. Equal Protection

The dilution of the weight of a citizen's vote constitutes a denial of the right to vote. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). As a result, the Equal Protection Clause demands that the votes of similarly situated voters be given similar effect. *See*, *e.g.*, *O'Brien v. Skinner*, 414 U.S. 524 (1974); *Roman v. Sincock*, 377 U.S. 695 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964). Florida's selective manual recount procedures, as approved by the court below, arbitrarily treat voters differently simply because they happen to live in different parts of the State, and accordingly conflict with prece-

dent of this Court cited above. A partially punched ballot, for example, may not be counted at all in most counties, might be counted as a vote in other counties, and in some counties it might be counted as a vote or not—depending on which set of ever-changing rules the election officials happen to be applying at the time it is reviewed. This has the effect not only of arbitrarily denying the right to vote to some persons, but of diluting the votes of the majority of Floridians who correctly cast their ballots. Either way, the present regime cannot withstand equal protection analysis.

The Supreme Court of Florida's decision cannot be reconciled with this Court's opinion in *O'Brien*, in which it struck down a New York law that allowed an inmate incarcerated outside of his home county to cast an absentee ballot, while not allowing a similarly situated inmate to cast a ballot when incarcerated within his home county. *See O'Brien*, 414 U.S. at 528-30. The manual recount scheme condoned by the Supreme Court of Florida suffers from failings similar to those contained in the New York law struck down in *O'Brien*. The right of a citizen to vote, and to have that vote counted equally to the votes of others similarly situated, cannot be infringed on the sole basis of the county in which the citizen resides, anymore than on the basis of the county in which a prisoner is incarcerated. Because the Supreme Court of Florida's decision "conflicts with [a] relevant decision[] of this Court," review is warranted. Sup. Ct. R. 10(c).

The decision below also directly conflicts with the Eleventh Circuit's decision in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). The court below held that conducting manual recounts in selected Democratic counties in the State long past the seven-day deadline imposed by state law and in a manner flatly inconsistent with the authoritative interpretation of the law by the state official charged with enforcing it does not violate the federal Constitution. In *Roe*, by contrast, as dis-

cussed above, the Eleventh Circuit held that to change the voting rules after election day and thus count some votes that should not be counted would unconstitutionally dilute the votes of those who complied with the established voting requirements. *Id.* at 581-82. In this case, conducting a manual recount in selected counties with no established standards in place to determine whether to conduct such manual recounts and, if so, what procedures to follow, subjects identically situated voters to different treatment solely on account of the county in which they reside. To include ballots in the final statewide tally that were counted solely because they were subjected to the different scrutiny attendant to a manual recount, would be as improper in this case as counting the noncompliant ballots at issue in *Roe*. As in *Roe*, the counting of ballots that should not be counted will unconstitutionally dilute the votes of those who properly cast their ballots on election day and those who do not live in the counties selected for a manual recount. In addition to being erroneous as a general matter, therefore, the Supreme Court of Florida's decision also fails to comport with the Eleventh Circuit's holding in *Roe*. This conflict further supports review in this Court. Sup. Ct. R. 10(b).

B. Due Process

The manual recount underway in certain Florida counties is unconstitutional because it is being conducted in the absence of meaningful objective standards. The officials responsible for overseeing the turmoil and constantly changing process that the nation has been watching for the past two weeks have failed to articulate rules for when a recount will be ordered, how long it will take, how it will be conducted, what votes will (and will not) be counted, and so on. This uncertainty derives from the fact that Florida law provides no meaningful guidance to help local canvassing boards determine whether to conduct a manual recount and, if so, the process to follow in determining whether to count any

given ballot. The only "standard" conceivably contained in the Florida statutes is the extremely general one that canvassing board's are to attempt "to determine the voter's intent." Fla. Stat. § 102.166(7). This vague statement of generalized purpose absolutely fails to provide any meaningful guide for local canvassing boards to follow in determining *how* to divine the voter's intent.

This total lack of guidance has, not surprisingly, led counties to apply different "standards" to the evaluation process, and, moreover, to the extent such standards have been announced, they have been renounced or changed within minutes or hours. Two counties that voted not to proceed with county-wide manual recounts reversed those decisions within days. The result is a chaotic, and entirely standardless and arbitrary, regime in which a question of national importance is being decided by government actors wholly unconstrained by limits or standards. It does not comport with the minimum standards of due process. *See*, *e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Moreover, counties have even departed from their past practices in conducting manual recounts. For example, the Broward County Canvassing Board has previously rejected the *need* for a manual recount in a situation strikingly similar to this one. In 1991, after an initial machine recount of the votes cast in a local city council race changed the margin of victory from five votes to three, the Board declined to conduct a manual recount. The Board concluded that the change in numbers was simply the result of "hanging paper chads" that fell away in the second count, causing two ballots initially counted for the victor to become overvotes (and thus no vote) because holes were actually punched for two candidates. *See Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 509 (Fla. Dist. Ct. App. 1992). The Board determined that such "voter errors . . . are caused by hesitant piercing, no piercing, or intentional or unintentional multiple piercing of computer ballot

cards," and did not warrant a manual recount. *See id.*[5] Despite this prior practice of not conducting manual recounts in cases where a discrepancy between the initial count and a machine recount was due to this kind of "voter error," Broward County opted to change course and conduct a manual recount in this case.

Similarly, Palm Beach County is reportedly considering reversing course from its prior guidelines to count so-called "dimpled" chads. *See* Dan Balz, *Bush Spurns Gore Recount Plan; Fla. Official Rejects New Tallies*, WASH. POST, Nov. 16, 2000, at A1; Don Van Natta, Jr., *Dimpled Votes Are New Hope For Democrats*, N.Y. TIMES, Nov. 22, 2000, at A1, *available at* http://www.nytimes.com/2000/11/22/politics/22DISP.html?pagewanted=2. In the Palm Beach County guidelines on counting ballots issued in November 1990, however, the County Canvassing Board made clear that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote." *See* Guidelines on Ballots With Chads Not Completely Removed, Adopted by the November 6, 1990 Canvassing Board.

The Eleventh Circuit made clear in *Roe* that changing the rules after an election to count ballots that historically had not been counted violates the Due Process Clause. *See Roe v. Alabama*, 43 F.3d 574, 580-81 (11th Cir. 1995). Nonetheless, this is precisely what Broward County and Palm Beach County are doing: They are engaged in a "post-election departure from [their] previous practice[s]." *Id.* at 581. This change in approach in determining whether to conduct a manual recount and, if so, how to count ballots, stands in direct conflict with

[5] The Fourth District Court of Appeals for Florida upheld the Board's decision not to conduct a manual recount in the *Hogan* case. *See Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. Dist. Ct. App. 1992).

the Eleventh Circuit's holding in *Roe*. Furthermore, these changes underscore the utter lack of standards in the Florida statute to guide local canvassing boards and the unconstitutional nature of the manual recounts that the Supreme of Court of Florida has approved.

C. First Amendment

Voting is expressive and associational activity protected by the First Amendment. *Williams v. Rhodes*, 393 U.S. 23 (1968). The arbitrary and standardless recounting regime approved by the Florida Supreme Court, however, violates the First Amendment rights of those Floridians who voted. It raises some citizens' voices above others, and drowns out still others. It distorts, and dilutes, the expression of political will that the people of Florida made on November 7—and which has been confirmed in subsequent recounts. It threatens to subvert the views of the many to those of the few, whose votes—after being reviewed according to no discernible, much less articulable, standards—are deemed by interested local officials to have more value than those cast in the rest of the State. The First Amendment cannot withstand such governmental overreaching.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 22, 2000

No.

IN THE

Supreme Court of the United States

NED L. SIEGEL, *ET AL.*,

Petitioners,

v.

THERESA LEPORE, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the use of selective, arbitrary, and standardless manual recounts that threaten to overturn the results of the election for President of the United States violates the Equal Protection Clause, the Due Process Clause, and the First Amendment.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties in the court below:

Ned L. Siegel, Georgette Sosa Douglas, Gonzalo Dorta, Carretta King Butler, Dalton Bray, James S. Higgins, and Roger D. Coverly, as Florida registered voters; Governor George W. Bush and Dick Cheney, as candidates for President and Vice President of the United States of America; Theresa LePore, Charles E. Burton, Carol Roberts, Jane Carroll, Suzanne Gunzburger, Robert Lee, David Leahy, Lawrence King, Jr., Miriam Lehr, Michael McDermott, Deannie Lowe, and Jim Ward, in their official capacities as members of the County Canvassing Boards of Palm Beach, Miami-Dade, Broward and Volusia Counties, respectively; Florida Democratic Party; Robert A. Butterworth, as Attorney General of Florida; Kenneth A. Horowitz, Catherine Ann Bowser, Sylvia Szymoniak, Joseph Morris, Karilee Halo Shames, Leona Jacques, and Laura Hamilton, as Palm Beach County voters.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ned L. Siegel, Georgette Sosa Douglas, Gonzalo Dorta, Carretta King Butler, Dalton Bray, James S. Higgins, and Roger D. Coverly (collectively, the "Voter Plaintiffs"), George W. Bush, and Dick Cheney respectfully pray that a writ of certiorari before judgment be issued in this case, which is now pending before the United States Court of Appeals for the Eleventh Circuit. Petitioners are Florida voters and the Republican Party candidates for President and Vice President of the United States. Those candidates—George W. Bush and Dick Cheney—have received the most votes cast by Floridians in the Presidential election held November 7, 2000. Nonetheless, in clear violation of the federal Constitution, the Supreme Court of Florida has barred the responsible state officials from certifying Governor Bush and Mr. Cheney as the prevailing candidates in the election in accordance with the popular vote, thereby placing in jeopardy the ability of Florida's duly appointed presidential electors to cast their votes on December 18, 2000. Petitioners seek this Court's immediate review of the unconstitutional procedures that are currently being used in Florida in an apparent effort to change the outcome of the Presidential election. Time is of the essence in this case, which raises important questions of historical significance.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit denying an injunction pending appeal (App., *infra*, 37a-46a) is not reported. The opinion of the United States District Court for the Southern District of Florida denying a preliminary injunction (App., *infra*, 1a-26a) is not reported.

JURISDICTION

The judgment of the district court was entered on November 13, 2000. App., *infra*, 26a. A timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit was filed on November 14, 2000. App., *infra*, 28a.

This petition is filed under this Court's Rule 11. The court of appeals, in which this case has been duly docketed, has entered interim orders in this case but has not yet entered judgment, and has directed all parties to file additional briefs during the week of November 27, 2000. The court today announced that if oral argument is scheduled, it would take place on November 29, 2000. Due to the importance and time-sensitivity of this appeal, as recently heightened by the decision of the Supreme Court of Florida in a related case, petitioners are seeking issuance of a writ of certiorari before judgment in the court of appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (which provides that this Court may exercise certiorari jurisdiction "before or after rendition of judgment or decree" by a federal court of appeals). *See also* 28 U.S.C. § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment").

Petitioners recognize that this Court only rarely grants certiorari before judgment. This case, however, is extraordinary. For two weeks, the outcome of the November 7, 2000 presidential election has been uncertain due almost entirely to the lack of a certified winner in the State of Florida. This is true despite the fact that Gov. Bush and Mr. Cheney have garnered more of the votes cast in Florida than their opponents, as initially counted and as recounted (and, in many cases, recounted again and again). Nevertheless, state election officials have been precluded by the state courts from certifying the results of the election (thus preventing any contests

from being lodged under Florida law) and documenting the appointment of electors in accordance with the vote, pending the completion of a selective, arbitrary, and standardless manual recount of ballots cast in only three heavily populated, predominantly Democratic counties selected by Florida Democrats.

This Court's Rule 11 recognizes that certiorari before judgment may be granted "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." For the reasons outlined above and discussed in more detail below, this is plainly such a case. The election of our Nation's highest elective office may turn on the Court's resolution of the issues presented. And, due to the protean nature of the state-court proceedings, this Court's immediate intervention is warranted in order to ensure that the rule of law is adhered to in this time of great national concern. As the intense public interest in this issue will attest, this case presents questions of similar magnitude to those in which the Court has previously granted certiorari before judgment. *See*, *e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *United States v. Nixon*, 418 U.S. 683, 686-87 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex parte Quirin*, 317 U.S. 1, 18-19 (1942).

Petitioner George W. Bush has separately petitioned this Court to review the November 21, 2000 decision of the Florida Supreme Court raising closely related questions. *Bush v. Palm Beach County Canvassing Board*, No. 00-____ (filed contemporaneously herewith). In the event the Court grants certiorari in that case, it would be appropriate also to grant review in this case in order that all the issues can be resolved at once. *See Taylor v. McElroy*, 360 U.S. 709, 710 (1959); *Brown v. Board of Education*, 344 U.S. 1, 3 (1952).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law … abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Pursuant to this Court's Rule 14.1(f), the provisions of Florida election law involved in this case, including Fla. Stat. §§ 102.111, 102.112, 102.141(4), 102.166, 102.168, and 106.23, are set forth at App., *infra*, 37a-46a.

STATEMENT OF THE CASE

This petition seeks to remedy Florida's widespread and systemic infringement upon and dilution of the right to vote in the November 7 presidential election in that State. The right to vote is the preeminent constitutional right in this nation; it is preservative of all rights. And the right to vote in a presidential election implicates uniquely important national interests; it is the most important of all votes for American citizens. The unequal, constantly changing, and standardless selective manual vote recount underway for the past two weeks in Florida is a patently unfair process that is having an impact far beyond Florida's borders, and that cries out for correction by this Court.

The essential facts are not reasonably disputable. A routine tabulation of Florida's presidential election ballots by conventional means and a recount by the same time-tested objective methods revealed that the Republican candidates held the lead. At that point, the Democratic Party demanded manual recounts in four carefully selected, heavily populated, Florida counties where the tabulated votes in the election had been predominately Democratic.

Although Florida law calls for certification of votes seven days after the election (except for overseas absentee ballots), those manual recounts are still underway 15 days later in three of those counties. The recounts are being conducted without uniform standards and differently in each of the three counties. They include pronouncements by persons with a stake in the outcome of the election of the ambiguously revealed "intentions" of thousands of individual voters. Two counties initially voted *not* to conduct county-wide recounts and then reversed those decisions in the face of pressure from interested parties.

Standards for evaluating ballots have changed repeatedly during the recounts. Indeed, after tabulating as proper votes only punch card ballots that had been perforated by voters, certain county officials yielded—two weeks after the election—to demands by Democratic Party officials for the adoption of yet another new standard which would permit local officials to validate ballots with mere "discernible indentations" ("dimpled chads"). On November 20, the Florida Democratic Party actually asked the Florida Supreme Court to fashion even more expansive new standards *de novo* for the recounting of the ballots in the counties it had singled out for special attention. This, presumably, would require starting the process over again.

The repeated processing of ballots by machines (at least three times in one county), and by hand manipulation by numerous persons, is unavoidably causing

physical degradation of ballots, changing them irrevocably. And selective manual recounts inevitably evaluate votes considerably more permissively in some counties than in others.

Whatever Florida's interests in the scrupulous evaluation of ballots cast in its election, those interests are not being served by a selective, capricious, and discriminatory process that sacrifices individual constitutional rights, compelling interests in the finality of the vote-tabulating process, and the integrity of our Nation's most important election in order to fulfill the ambition of one political party to secure a more favorable outcome.

A. Factual Background

1. The Presidential Election

On November 7, 2000, the quadrennial Presidential election was held throughout the United States. In Florida, voters cast ballots for several offices, including for the appointment of electors for President and Vice President of the United States. App., *infra*, 3a. The ballots counted in Florida showed that Governor George W. Bush and Dick Cheney received more votes than their opponents, Vice President Al Gore and Senator Joseph Lieberman, by a margin of 1,784, or 0.0299% of the total Florida vote. *Id.*

Florida law provides that, if a candidate is defeated or eliminated by one-half of one percent or less of the votes cast for an office, the State's Elections Canvassing Commission shall order a recount of the votes cast with respect to that office, unless the defeated candidate "request[s] in writing that a recount not be made." FLA. STAT. § 102.141(4) ("the .5% recount"). The 5% recount is performed in the same manner as the original count. *Id.* § 102.141(4); *see also id.* §§ 97.021(2)(c), 101.5603, 102.166(3)(c); App., *infra*, 5a.

On November 8, pursuant to Fla. Stat. § 102.141(4), each of the canvassing commissions of Florida's 67

counties began a recount of the returns. App., *infra*, 5a; Record on Appeal in the United States Court of Appeals for the Eleventh Circuit ("C.A. Rec.") 2 at 7 ¶ 30. At the completion of that recount, although the numerical totals were different, the outcome was the same as the initial vote count: The Bush-Cheney ticket prevailed over the Gore-Lieberman ticket. *See id*.

2. The Selective Manual Recounts

After the second statewide counting of ballots, on or about November 9, 2000, Florida Democratic officials filed requests for manual recounts of ballots in Broward, Miami-Dade, Palm Beach, and Volusia Counties. App., *infra*, 5a.[1]

Florida Statutes § 102.166(4) provides that any candidate or his party (but not a voter) may file a written request with a county canvassing board for a "*manual* recount" within 72 hours after midnight of the date of the election or prior to the time the canvassing board certifies the results of the election, whichever occurs later. Fla. Stat. § 102.166(4) (emphasis added); *see* App., *infra*, 5a. It further provides that the request for a manual recount must "contain a statement of the reason the manual recount is being requested." Fla. Stat. § 102.166(4)(a).

As of November 7, Florida statutes set forth no standards to guide county canvassing boards in determining whether to initiate a manual recount. *See* Fla. Stat. § 102.166(4)(c) (stating simply that "[t]he county

[1] Petitioners acknowledge and are considering an appropriate response to the arguments below of the members of the Volusia County Canvassing Board, that they have already certified results to the Secretary of State and that Volusia does not use punch card ballots.

canvassing board may authorize a manual recount"); *see also* App., *infra*, 13a-14a. Respondent County Boards have therefore asserted and exercised essentially limitless discretion in making that decision.[2]

Florida law provides that "[t]he manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate." Fla. Stat. § 102.166(4)(d); *see* App., *infra*, 5a, 13a-14a. "The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts." Fla. Stat. § 102.166(4)(d). If the board concludes that this manual recount indicates an error in the vote tabulation that could affect the outcome, the county canvassing board has three options: (a) correct the error and recount the remaining precincts

[2] Under Florida law as it existed prior to the election, the "judgments" of the Secretary of State in fulfilling her specifically charged duties in the election process "are entitled to be regarded by the courts as presumptively correct." *Krivanek v. The Take Back Tampa Political Comm.*, 625 So. 2d 840, 844 (Fla. 1993) (quoting *Boardman v. Esteva*, 323 So. 2d 259, 268 n.5 (Fla. 1975); *see also Greyhound Lines, Inc. v. Yarborough*, 275 So. 2d 1, 3 (Fla. 1973) ("This Court has often reiterated the principle that a construction of a statute by the administrative body in whom authority to administer is reposed is entitled to great weight and should not be overturned unless clearly contrary to the language of the statute.") The Florida Supreme Court's post-election decision in *Palm Beach County Canvassing Bd. v. Harris*, however, has reversed that preexisting doctrine of Florida law, overridden the Secretary's decision regarding the law governing the acceptance of late-filed returns, and now arrogates to the state courts the new-found authority to legislate exceptions to state election law.

by machine; (b) ask the Florida Department of State to verify the tabulation software used; or (c) manually recount all ballots. Fla. Stat. § 102.166(5)(a)-(c); App., *infra*, 14a. As of the date of the election, Florida law did not specify criteria for determining which of these options to select in a particular case. The recount process authorizes the county canvassing board to determine the voter's "intent," but no statutory standards were set forth to guide or constrain such determinations, leaving such decisions to *ad hoc* determinations by canvassing boards.

On Saturday, November 11, 2000, the Palm Beach County Canvassing Board began a manual review of the ballots cast in the four precincts selected for review. That review of only 1 percent of the ballots cast in Palm Beach continued until the early morning hours of Sunday, November 12, 2000. C.A. Rec. 11 at 2. Errors and irregularities of various sorts marked the process. Observers noted, for example, that the ballot cards were laid carelessly about the counting room and that security precautions were lacking. *Id.* One member of the Palm Beach Board, Carol Roberts, was overheard asking only Democratic observers for their views on ballot cards, thus bringing only those monitors of one party into the decision making process. *Id.* at 5-6.

As manual recounts commenced and recommenced in the other three selected counties, the standardless, capricious, and continuously changing nature of the manual recounts became even more pronounced. Far from enhancing the accuracy or reliability of the results produced by two statewide machine counts, selective manual recounts conducted in this manner serve only to undermine confidence in the outcome and provide limitless opportunity for error, manipulation, and inconsistent decisions regarding the interpretation of ballots.

1. Physical Manipulation And Degradation Of Ballots

The selective manual recount process has unquestionably damaged ballot integrity. Representatives of the County Respondents have admitted that the more the ballots are handled, the more chads will fall off, making it more likely that the ballot recount (and any future recount under constitutional standards) will produce different numbers from this cause alone. C.A. Rec. 6 at ¶ 6c. Observers of the manual recounts have consistently reported that ballots have been bent, prodded, poked, and aggressively handled. *E.g.*, C.A. Rec. 11 at 5-7. Ballots have been twisted, rumpled, creased, and dropped; some have been stained with ink, poked with pens, and crushed. C.A. Rec. 11 at 25 ¶ 7 ("I personally observed Canvassing Board counters 'twisting' and otherwise manipulating the paper ballots in an attempt to dislodge chads from the ballots themselves."); Appellants' Second Emergency Motion To Supplement The Record On Appeal In The United States Court Of Appeals For The Eleventh Circuit ("Supp. II Rec.") tab 37 at ¶ 3a(ii); Supp. II Rec. tab 39 at ¶ 3. In some instances, the ballots were even used as fans. Supp. II Rec. tab 44 at ¶ 3.3.

Unsurprisingly, this aggressive mishandling of ballots, especially after two or more machine counts of the ballots, dislodged large numbers of chads, which littered the floors of the recount rooms. *E.g.*, Supp. II Rec. tab 25 at ¶¶ 5-6, 18; C.A. Rec. 11 at 7. When observers attempted to memorialize the presence of dislodged chads, Democratic officials and county employees attempted to sweep away the chads rather than have the physical degradation documented. Supp. II Rec. tab 26 at ¶ 3; Supp. II Rec. tab 24 at ¶3. Thus, ballots that survive the repeated mechanical and manual recounts to which they have been subjected may not resemble the ballots Floridians actually cast on November 7, and the tabulations that result from this process cannot be said to be an ac-

curate, fair or consistent tabulation of the votes cast by Floridians in that election.

2. Irregularities In Counting Methods

The manual recount process is chaotic, changing and uncertain. Differing and sometimes self-contradictory guidelines were issued and then retracted. Other rules were not communicated to the ballot counters. The inevitable result was a complete lack of uniformity across the four counties and within the counties.

For example, a representative of the Palm Beach Board admitted that during the initial manual recount the board had applied inconsistent tests and procedures for determining which ballots to count and had changed its approach to that crucial issue midstream. C.A. Rec. 11 at 13 [("[t]he canvassing board . . . just moments ago . . . decided to not go with the light test, but to go with the test that's reflected on the procedures where, if one of the four corners of the chad is detached, . . . then that will be a vote"); *id.* at 16 ("[T]hey were using the light test. Now if there is one corner, or three corners attached still, it won't be counted as a vote.").] According to another Palm Beach Board official, the standard for determining which ballots to count manually "is very vague in the law," and "[t]he canvassing board . . . make[s] the rules. . . . They can do what they want as far as once they decide amongst themselves." *Id.* at 12, 19.

In Miami-Dade County, the supervisor of elections asked the canvassing board to define the criteria that would be employed in conducting the remaining partial manual recount. Appellants' Emergency Motion To Supplement The Record On Appeal In The United States Court Of Appeals For The Eleventh Circuit ("Supp. Rec.") 10 at 99, 101. In response, the chairman of the board stated that he could not know whether to count a ballot "until I reasonably see" it. Supp. Rec. 10 at 102. As he elaborated, "I don't think we should limit

ourselves in the parameters by which we consider. . . . I believe that we will know when we see, so to speak, what we are looking at" Supp. Rec. 10 at 102-03. The board thus declined to set any standards, Supp. Rec. 10 at 131, leaving the question of which ballots were to be counted to *ad hoc*, case-by-case discretion applied by officials acting with full knowledge of the election results elsewhere.

As Respondent Florida Democratic Party conceded in its Answer Brief in the Florida Supreme Court, "Different canvassing boards are using different standards." In fact, the Florida Democratic Party ("FDP") has sued to insure this divergence occurs. Supp. II Rec. tab 19.[3]

These widely varying policies (or lack of policies), and the confusing legal challenges to them, have translated into severe problems in the vote tabulating process itself. In Broward County, for example, the two-corner rule has apparently not been well-communicated to the counters (Supp. II Rec. tab 37 at ¶3a) – and is, in any event, under legal attack. Other internal counting rules, such as double-counting final stacks of ballots, have

[3] Respondent FDP filed a lawsuit against the Palm Beach County Canvassing Board over its initial decision to apply a uniform "detached chad" policy. The FDP preferred an open-ended "totality-of-the-circumstances" test. Supp. II Rec. tab 19 at ¶25. The Circuit Judge ruled on November 15 that Palm Beach County could not adopt a definite rule requiring that certain types of ballots be rejected, in effect mandating an ad hoc, standardless approach. Supp. II Rec. tab 12. FDP also sued to compel Broward County Canvassing Board to adopt a "totality-of-the-circumstances" rule rather than the more definite "two corner" rule, and also to compel the acceptance of so-called "dimpled" and "pregnant" chads. The Broward County Circuit Judge orally indicated that the two-corner-rule was too restrictive but has not issued a written ruling. Supp. II Rec. tab 17 at 8. While waiting for a ruling, Broward continues to use its two-corner rule. *Id.*

been announced, temporarily applied, and then rescinded. Supp. II Rec. tab 47 at ¶3. In general, confusion, disarray and mistakes are commonplace in the vote-counting process. Supp. II Rec. tabs 29, 33 & 46. The lack of intelligible, uniform standards fatally undermines any claim that manual recounting actually captures the intent of the voters.

3. Political Pressure

The atmosphere has become politically-charged with pressure being exerted on the county boards and their lawyers by prominent political figures such as former Secretary of State and current Gore campaign spokesperson Warren Christopher and Florida Attorney General Robert Butterworth. Supp. II Rec. tab 14. Indeed, observers also noted that the elections officers exhibited partisan bias and even hostility. C.A. Rec. 11 at 57 (guidance to ballot counters expressed hostility to Republican attorney observers and implied that a Republican President would endanger the economy and increase the chances of war). Such external political pressure obviously increases the likelihood that conscious or unconscious bias will further taint the recount.

Other signs of politically driven decisionmaking proliferate. For example, the Broward County Canvassing Boards originally decided not to authorize a countywide manual recount, but then reversed that decision in a 2-1 vote after extensive political lobbying. Supp. II Rec. tab 14 at 5. Media reports have widely recounted the erratic nature of the various canvassing boards and their decisions whether to proceed with manual recounts. *See* Supp. Rec. 6 (noting decision change by Miami-Dade county), 8 (noting decision change by Broward county), & 9 (same). The on-again, off-again process further illustrates the unchecked nature of the County Respondents' discretion, and demonstrates that the recounts do not provide a stable, fair, deliberate, and objective counting of ballots.

B. Proceedings In The District Court

On November 11, 2000, Petitioners filed this action in the United States District Court for the Southern District of Florida seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to enjoin the violation of their constitutional rights arising out of the selective, arbitrary, capricious, and discriminatory manual recounting of ballots and to protect the integrity of, and bring finality to, the November 7 Presidential election. Petitioners also filed a motion for a temporary restraining order or, in the alternative, a preliminary injunction to enjoin the members of the canvassing boards of Broward, Miami-Dade, Palm Beach, and Volusia Counties, Florida (the "County Respondents") from violating Petitioners' constitutional rights. After a hearing, the district court denied Petitioners' motion on November 13, 2000. App., *infra*, 1a-26a. Plaintiffs filed a notice of appeal the following day. *Id.* at 27a-28a.

C. Proceedings On Appeal

On November 15, 2000, Petitioners filed their opening brief on appeal, together with a motion for an injunction pending appeal and a motion to expedite the appeal. On that same day, the court of appeals voted to hear the case en banc. Thereafter, on Friday, November 17, 2000, the court of appeals denied the motion for injunction pending appeal without prejudice (App., *infra*, 31a), and granted Petitioners' motion to expedite the appeal. The court subsequently ruled that briefing would be completed by November 28, 2000, and oral argument, if any, would be held November 29, 2000.

Meanwhile, on November 21, 2000, the Supreme Court of Florida ruled that the County Respondents were entitled to continue their selective manual recounts and certify results based on those recounts, notwithstanding the expiration of the seven-day time limit imposed by Fla. Stat. §§ 102.111 and 102.112. Petitioner George W.

Bush is an intervenor in that state court action, and is filing contemporaneously herewith a petition for a writ of certiorari seeking review of that decision. Because these cases present closely related issues involving the results of the November 7 Presidential election, and in order that this Court might have both of these crucial cases before it sufficiently in advance of the meeting of the Electoral College in order to permit a meaningful decision on the merits, Petitioners determined to file this petition for a writ of certiorari before judgment. Petitioners have also filed a motion to expedite consideration of this petition in order to permit a decision on the merits in a timely manner.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because The Questions Presented Are Of Imperative Public Importance, And Review By This Court Is Essential To Bring Finality And Legitimacy To The Presidential Election

This case is extraordinary. It raises issues of imperative public importance seen only once in a generation. Indeed, not since *United States v. Nixon*, 418 U.S. 683 (1974), have questions of similar magnitude to those presented here been brought before this Court.

For two weeks, our Nation has waited to have confirmed the outcome of the November 7, 2000 election for President of the United States. Governor George W. Bush and Dick Cheney have garnered the most votes cast in Florida, as initially counted, as recounted, and as recounted again after receipt of overseas ballots. Nevertheless, the Secretary of State of Florida has been precluded from certifying these results or appointing electors in accordance with that popular vote, pending the completion of a selective, arbitrary, and standardless manual recount of ballots cast in only a handful of heavily Democratic counties in Florida.

This Court's direct and immediate review of the lower courts' refusal to halt the selective manual recount is warranted because this case "is of such imperative public importance" that the Court should deviate from normal appellate practice. Sup. Ct. R. 11. As discussed in greater detail below, this case presents important questions regarding the First and Fourteenth Amendments' protections for the fundamental right to vote. Moreover, these questions are presented in the context of one of the closest elections for President in our Nation's history.

There is a profound national interest in ensuring the fairness and finality of elections, particularly in an election for the highest office in the land. The constitutionality of the arbitrary recount process currently being implemented by the County Respondents in this crucial election presents precisely the type of question that the Nation justifiably expects should be decided by this Court. Indeed, absent a decision by this Court, the election results from Florida may lack finality and legitimacy. The consequences may well include the ascension of a President of questionable legitimacy, or a constitutional crisis.

II. Review Is Warranted Because The Lower Courts' Refusal To Halt The Arbitrary, Standardless And Selective Manual Recounts Conflicts With Decisions Of This And Other Courts

This case also warrants this Court's review because it presents important questions relating to the most fundamental of all constitutional rights—the right to vote. Specifically, this case challenges the use of arbitrary, standardless, and selective manual recounts as violative of the Equal Protection Clause, the Due Process Clause and the First Amendment.

A. The Manual Recount Constitutes a Violation of Equal Protection

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote" *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The right to vote is "denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. "The conception of political equality . . . can mean only one thing—one person, one vote The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." *Id.* at 558 (internal citations omitted).

It is well established that the Equal Protection Clause prohibits government officials from implementing an electoral system that operates to give the votes of similarly situated voters different effect based on the happenstance of the county or district in which those voters live. *See, e.g., Roman v. Sincock*, 377 U.S. 695, 712 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964) (state apportionment scheme "cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside").

While these one-person, one-vote cases involve the intentional unequal weighting of votes, the requirement of equal treatment of voters in different geographical areas has been extended to situations in which a facially neutral voting scheme results, even innocently, in the disparate treatment of voters based on the counties in which they live. In *O'Brien v. Skinner*, 414 U.S. 524 (1974), for example, this Court held unconstitutional the New York absentee ballot statute because it made no provision for persons who were unable to vote while they were incarcerated in their county of residence. Under the New York statute, "if [a] citizen is confined in

the county of his legal residence he cannot vote by absentee ballot as can his cellmate whose residence is in the adjoining county." *Id.* at 529. As a result, the Court held, "New York's election statutes . . . discriminate between categories of qualified voters in a way that . . . is wholly arbitrary." *Id.* at 530. The Court therefore concluded that "the New York statutes deny appellants the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 531.

As in *O'Brien*, Florida's selective manual recount provisions, as currently being applied, arbitrarily treat voters differently based solely on where they happen to reside in Florida. For example, where there is a partial punch or mark for one candidate on a ballot, that ballot may be counted in the four counties undertaking a manual recount, but not counted in any other Florida county. In fact, those ballots may be counted in some of those four counties, but not in others, because each county is free to invent its own standards. Or such standards may be changed from day to day or hour to hour even within a single Florida county. This intentional discrimination among voters on the basis of their county of residence, or even the precinct in which they reside, violates the fundamental principle of equal protection that voters cannot be subjected to disparate treatment "merely because of where they reside." *Reynolds*, 377 U.S. at 557; *see id.* at 566 ("Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.") (citation omitted).[4]

[4] A recent opinion letter of the Attorney General of the State of Florida seems to endorse this principle. In response to a request for an opinion by the Palm Beach Board on whether it should continue with its manual recount, the Attorney General reasoned:

[Footnote continued on next page]

B. The Manual Recount Violates Due Process

The facts here clearly present "'an officially-sponsored election procedure which, in its basic aspect, [is] flawed,'" *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. 1981) (quoting *Griffin*, 570 F.2d at 1077-78), *cert. dismissed*, 459 U.S. 1012 (1982), and which manifestly violates the Due Process Clause.

Florida's arbitrary manual recount is unconstitutional, *inter alia*, because it fails to set any meaningful standards for determining whether a manual recount should be initiated, which ballots should be manually counted, and what standards should be applied in determining whether a ballot should or should not be counted. As this Court has made clear, a State cannot deny an individual's liberty or property interest—including the right to vote—in an arbitrary and capricious manner. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). State election laws and practices having that effect constitute a denial of due process.

[Footnote continued from previous page]

> The circumstances surrounding these legal issues are extremely serious. If hand recounts have already occurred in [a] number of . . . counties . . . while similar hand counts are blocked in other counties . . ., a two tier system for reporting votes results.
>
> A two-tier system would have the effect of treating voters differently, depending upon what county they voted in. A voter in a county where a manual count was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.

Supp. Rec. 4 at 1 (Letter from Robert A. Butterworth, Attorney General of the State of Florida, to The Hon. Charles E. Burton, Chair, Palm Beach County Canvassing Board, Nov. 14, 2000).

In *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970), the Seventh Circuit invalidated an election board's imposition of *ad hoc* requirements for nominating petitions, agreeing with the plaintiffs' contention that "the Board's failure to issue guidelines clarifying the statutory standards for nominating petitions contravened due process." *Id.* at 1054, 1055. As the Seventh Circuit explained, "protection of the full measure of First and Fourteenth Amendment freedoms commands that state regulation of nominating procedures include a clear statement of the specific requirements by which nominating petitions will be tested." *Id.* at 1058.

The arbitrary, capricious, and standardless manual recount being used here suffers from the same fault as the nomination procedure invalidated in *Briscoe*. If the State of Florida wishes to implement a manual recount procedure, it must ensure that meaningful guidelines are established for determining whether and how to conduct such a recount, rather than leaving such crucial decisions to the unbridled discretion and arbitrary decision making of local election officials, who may have a keen personal interest in the outcome of an election and who administer the election system in counties selected by candidates or political parties who share those interests. The State's failure to provide such guidelines constitutes a clear violation of the Due Process Clause.[5]

[5] Before conducting a full manual recount under subsection 5, a county must first conduct a partial manual recount of "at least three precincts and at least 1 percent of the total votes cast." Fla. Stat. § 102.166(4)(d). With respect to that crucial threshold inquiry, the statute supplies no standards to guide the canvassing boards' discretion to open an initial partial manual recount. *See* Fla. Stat. § 102.166(4)(c). Hence, the critical determination to initiate the manual recount process at all is open to arbitrary decision making by county officials.

The manual recount scheme being implemented selectively in Florida is utterly lacking in meaningful standards. The statute by which the mandatory recount is being conducted prescribes no standards whatsoever to guide or constrain Florida's canvassing boards in determining when or how to count any particular ballot. When a statute's "purpose" is as open-ended as the correction of error, and the statute supplies no standards to guide the determination of "error," any such general statement of purpose provides no meaningful standard for its application by county officials. This is particularly the case when the statute authorizes persons, without any standards or constraints, to divine the "intent" of voters. In any event, the existence of statutory procedures for conducting recounts cannot substitute for the articulation of substantive standards to guide the canvassing board's implementation of the manual recount procedures.[6]

Indeed, the arbitrary and standardless nature of the process is confirmed by statements recently made by Mr. Nichols, the county spokesman for Palm Beach County. C.A. Rec. 11 (CNN Transcript: "Manual Vote Count Procedure Varies in Palm Beach County," Nov. 11, 2000). With reference to the question whether partially punched ballots should be counted if one could see

[6] For example, the procedural provisions of the manual recount statute address such matters as the composition of counting teams, the process for referring ballots to the canvassing board, and the procedures for verifying tabulation software. Fla. Stat. § 102.166(7)-(10). Such procedures, however, do not guide the canvassing board's discretion in determining whether or not to count a particular ballot. Although Section 102.166(7)(b) instructs the board "to determine the voter's intent," it gives no indication of how that subjective determination is to be made. The resulting discretion leaves an infinite space for arbitrary and unequal treatment of voters.

sunlight through the partial punch (the so-called "sunlight method"), Mr. Nichols explained that the standard is "very vague in the law." *Id.* at 12. As Palm Beach County Attorney Leon St. John further explained, the Palm Beach Board decided both to adopt *and* abandon the sunshine method in the midst of the recount itself. He noted that "[t]he canvassing board . . . just moments ago . . . had decided to not go with the light test, but to go with the test that's reflected on the procedures where, if one of the four corners of the chad is detached, . . . then that will be a vote." *Id.*; *see also id.* (statement of Bob Nichols, Palm Beach County spokesman) ("[T]he policy would be that if you don't – they were using the light test. Now if there is one corner, or three corners attached still, it won't be counted as a vote."); *id.* at 18 (statement of Bob Nichols) ("There was a change in the middle."). Hence, given the circumstances of this case, the next President may be determined not by the votes counted and recounted by neutral, tested equipment made for the express purpose of tabulating and recounting ballots, but by an ephemeral, elusive, and infinitely elastic process that allows officials to change, and change again, without reference to established law, in the course of the process itself. And these officials are the very officials selected by the partisans in the election by virtue of the unlimited discretion by which counties for manual recounts are selected, and are acting with knowledge that their decisions may change the outcome of the Presidential election.

With humans making subjective determinations about an absent voter's intent, without standards established by law, there is always the risk that the method for determining how to count a vote will be influenced, consciously or unconsciously, by the officials' desire for a particular result. This risk of arbitrary and subjective decision making is especially acute in an extremely close election for the most important office in the nation. In effect, if the selective manual recount is allowed to proceed to the apparent end desired by its defenders, the

next President of the United States may be selected by the arbitrary and standardless decisions of a handful of potentially interested county officials about such matters as whether to count a vote because a ray of light shines through a hole or because only one, rather than two, corners of a chad remains attached to a ballot.

C. The Manual Recount Violates The First Amendment

Because the "right of qualified voters, regardless of their political persuasion, to cast their votes effectively" overlaps with "the right of individuals to associate for the advancement of political beliefs," voting is protected by the First Amendment. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). For the reasons discussed above, the selective manual recounts impinge upon and dilute First Amendment rights. Moreover, the manual recounts violate the First Amendment because, under Fla. Stat. § 102.166(4), the canvassing boards are vested with standardless discretion to initiate manual recounts. The Constitution prohibits state actors from exercising unconstrained discretion over the application of laws that implicate First Amendment rights. *See City of Lakewood v. Plain Dealer Publ'g*, 486 U.S. 750, 763 (1988) ("[The] danger [of a First Amendment violation] is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official."); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (noting that the First Amendment "is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement," and that laws affecting First Amendment rights are invalid "if they are wholly lacking in terms of susceptible objective measurement") (internal quotation marks and citations omitted).

In addition, if Florida is permitted to count some votes differently from others – even in the mistaken be-

lief that the disparate treatment will increase accuracy – the government will effectively lift some voices above others. The First Amendment clearly forbids that result. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 22, 2000

November 23, 2000
Response by Al Gore to November 22, Bush Appeal

Nos. 00-836 and 00-837

IN THE

Supreme Court of the United States

George W. Bush,

Petitioner,

v.

Palm Beach County Canvassing Board, *et al.*,

Respondent.

Ned L. Siegel, *et al.*,

Petitioner,

v.

Theresa LePore, *et al.*,

Respondent.

On Petitions for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eleventh Circuit and for a Writ of Certiorari to the Supreme Court of Florida

BRIEF IN OPPOSITION OF RESPONDENTS AL GORE, JR., AND FLORIDA DEMOCRATIC PARTY

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's interpretation of Florida law presents a substantial federal question for this Court to review or instead a determination reserved to the States?

2. Whether the State of Florida's statutorily mandated manual recount process, indistinguishable from the laws of other states and reflective of a process that has been applied throughout this country for centuries, violates the U.S. Constitution?

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BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

In two companion petitions for writs of certiorari, Governor George W. Bush, together with related parties, asks this Court to interfere with ongoing manual recounts of the ballots cast in the State of Florida for the President of the United States as provided under Florida law. One petition, which seeks review of the judgment of the Florida Supreme Court interpreting provisions of the Florida Election Code governing manual recounts, rests on intemperate and insupportable mischaracterizations of that court's decision as usurping the role of the state legislature. In fact, the Florida Supreme Court played a familiar and quintessentially *judicial* role: it interpreted Florida law "us[ing] traditional rules of statutory construction to resolve [statutory] ambiguities." Slip op. at 39. Indeed, the Court expressly "decline[d] to rule more expansively, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it – the Legislature." *Id.* Thus, the questions purportedly framed in the petition are not in fact presented by this case.

The other petition seeks certiorari before judgment in a case in which the U.S. District Court for the Southern District of Florida has merely denied a preliminary motion to restrain the recounts and the U.S. Court of Appeals for the Eleventh Circuit has denied an injunction pending appeal and has nearly completed expedited briefing. That petition necessarily would bring only an extremely narrow question for the Court's consideration. In addition, that petition is riddled with non-record, *ex parte*, partisan accusations regarding the manner in which the Florida recount is proceeding. These accusations are false and have not been tested in court through cross-examination, verification, or judicial fact finding. Indeed, Petitioners have deliberately avoided proceeding in the appropriate fora where their factual claims could be considered and resolved. All of this underscores the undeveloped nature of this case, the absence of adequate foundation in the courts

below, and the inappropriateness of the extraordinary step of certiorari before judgment.

Moreover, the substance of Petitioners' federal claims does not warrant review by this Court. Petitioners ask this Article III Court to interfere with a task that has been expressly delegated to the State of Florida by the U.S. Constitution's command in Article II that "[e]ach *State* shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2 (emphasis added). This is not merely a question of a power "reserved" to the States by the Constitution, cf. U.S. Const. amend. X, but of an express constitutional delegation of exclusive authority. The Constitution explicitly confers upon the States plenary and exclusive power to establish the manner in which their presidential electors are chosen. *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968); *McPherson* v. *Blacker*, 146 U.S. 1, 27 (1892); *Ray* v. *Blair*, 343 U.S. 214, 224-25 (1952). At bottom, Petitioners seek to have this Court intervene in the process by which the organs of the Florida state government are effecting the procedure by which the State legislature has determined to appoint that State's presidential electors.

Beyond the obvious reasons that certiorari should be denied in this case – the patent insubstantiality of the federal claims presented, the absence of any conflict in authority, the utterly factbound and undeveloped nature of Petitioners' arguments – there are profound reasons of institutional legitimacy that counsel against a grant of certiorari. To begin with, principles of federalism that this Court has repeatedly reaffirmed against vigorous challenge counsel strongly against interference by this, or any, federal court in the process articulated by Florida state law, as set out by statute and interpreted by the courts of that State. Only on the most compelling showing of a constitutional violation should a federal court interfere with this task, uniquely delegated by the Constitution to the State government.

Petitioners' federal claims, which, even if properly presented,[1] are insubstantial and do not come close to meeting the high threshold that would require this Court to interfere with a State's process for appointing its electors for President of the United States.

Finally, this Court's involvement here will not add "legitimacy" to the outcome of the election. *Contra* Pet. for Certiorari, *Bush* v. *Palm Beach County Canvassing Bd.,* No. 00-836 (Nov. 22, 2000) [hereinafter *Bush* Pet.] at 12. The cases below involve only questions of Florida state law, questions that even Petitioners ultimately agree are within the power of the Supreme Court of Florida to resolve. *Id.* at 10 ("Given the national significance of the Florida election results, it is essential that the counting of ballots be conducted in a fair and consistent manner in accordance with established Florida law."). This Court's interference with the normal processes by which questions of state law are resolved, and indeed, with the ongoing processes by which the President and Vice-President of the United States are chosen, would only diminish the legitimacy of the outcome of the election. That is particularly true given that it is difficult to imagine how this Court could intervene in the still-ongoing state proceedings so rapidly and clearly as not to deflect and derail the election process in untoward and unprecedented directions.

Thus, even if it were true that the outcome of the case may raise for the public "questions of similar magnitude" to those presented in cases such as *United States* v. *Nixon*, 418 U.S. 683 (1974), see Pet. for Certiorari, *Siegel* v. *LePore*, No. 00-83 (Nov. 22, 2000) [hereinafter *Siegel* Pet.] at 15, it presents no federal constitutional *questions* of similar magnitude – indeed, no

[1] There is the greatest doubt that Petitioners' federal claims in the state court action are fairly presented here, given that Petitioners consciously decided to avoid discussing federal law in the Florida trial court and raised the question before the state Supreme Court only in a few pages at the end of a brief there. See Slip op. at 10 n.10.

constitutional questions of any real substance at all. Thus, the petitions for certiorari in both *Bush* v. *Palm Beach County Canvassing Board*, and *Siegel* v. *LePore* should be denied.

STATEMENT OF THE CASE

A. The Election

On November 7, 2000, Florida citizens cast over 5,820,000 ballots in the general election for the President of the United States. Under Florida's election law, the outcome of this election would determine what slate of electors would cast Florida's twenty-five electoral votes for the President of the United States.

Based on initial returns transmitted to it by the county canvassing boards of Florida's sixty-seven counties, on Wednesday, November 8, 2000, the Florida Division of Elections ("Division") reported that Governor George W. Bush had received 2,909,135 votes for President and that Vice-President Al Gore had received 2,907,351 votes.

B. Florida's Recount Provisions

Because the margin between the two leading candidates was less than one-half of one percent of the total votes cast for that office, Florida law required an automatic recount of the ballots. Fla. Stat. § 102.141(4). No specific process is required under Florida law for this recount. Most counties conducted this recount by simply repeating whatever process, usually machine, they had used to count the ballots initially. A few counties, however, conducted hand recounts. At the end of this initial automatic recount, the margin between the two leading candidates for President of the United States was reduced from the initially stated 1,784 votes to 300 votes.

Florida law provides that its counties may conduct a further manual recount to address "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). In any county, any candidate " may file a written request with the county canvassing board for a manual recount."

Id. § 102.166(4)(a). The statute requires that the request "contain a statement of the reason the manual recount is being requested." *Id.* Any such request "must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later." Fla. Stat. § 102.166(4)(b).

The purpose of the manual recount is to determine whether there is "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). If a county canvassing board decides to grant a request for a manual recount, it need not initially order a county-wide recount. Rather, an initial recount only "must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue * * * . The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts. *Id.* § 102.166(4)(d). The statute further provides that:

> If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board *shall*:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.

Fla. Stat. § 102.166(5) (emphasis added).

Manual recounts must be conducted in accordance with the procedures set forth in Section 102.166(7). Those procedures require that the county canvassing board appoint counting teams of at least two electors each who are members of different political parties to manually recount the ballots. If a counting team is unable to determine a voter's intent in casting a ballot,

the ballot must be "presented to the county canvassing board for it to determine the voter's intent." Fla. Stat. § 102.166(7)(a)-(b).

C. The Manual Recounts, Petitioners' Attempted Federal Action, and the Scope of the *Siegel* Petition

After the automatic statewide recount reduced the margin between Governor Bush and Vice-President Gore to 300 votes, the Florida Democratic Party requested a manual recount in four Florida counties: Palm Beach, Volusia, Broward, and Miami-Dade. Pursuant to those requests and the requirements of Florida Statutes Section 102.166(4)(d), the county canvassing boards of those counties conducted a sample manual recount of 1 percent of the total votes cast in their respective counties.[2]

[2] Both Palm Beach County and Broward County employ a punch card balloting system. Voters in the counties are given a rectangular card ballot covered with perforated squares. Although the squares are numbered, the candidates' names do not appear on the ballot. Voters are instructed to slide the card into a machine, which holds a book listing the candidates for office next to a series of holes. Voters are told to insert the stylus provided into the hole next to their candidate of choice. The goal of the voting machine set up is that the stylus will be inserted in such a way that a "chad," one of the perforated squares, is completely separated from the ballot. If this happens a machine reader will later be able to count the votes reflected on the ballot. Unfortunately, a chad does not always fully separate from a ballot when punched by a stylus. The chad may only partially detach from the card, or, if the voting machine becomes clogged with chad from previous voters, the ballot may only be "dimpled." The machine reader will not be able to read the ballot. Such uncounted ballots are called "undervotes."

Because of the high percentage of undervotes created by punch card voting systems, the vast majority of counties in Florida do not use them. In Broward County, the undervote in the November 7, 2000, election for President was over 6,000 ballots. In Palm Beach County it was an incredible 10,000 ballots. Absent a manual recount, the votes reflected on these ballots would not be counted in the election.

The dislodging of chad from punch count ballots is a consequence of the fact that partially dislodged chads remain attached to the cards. See Decl. of Rebecca Mercuri, App. of Appellee-Intervenor Florida Democratic Party in *Siegel*, No. 00-15981-C (11th Cir.) tab 16, ¶ 9. Contrary to the suggestion of Petitioners' filing, it is virtually impossible to dislodge chads that have not

At the conclusion of those initial recounts, each of the four counties ultimately determined that the sample had revealed tabulation discrepancies that could affect the outcome of the election and decided, consistent with the requirements of Section 102.166(5)(c), to manually recount *all* of the ballots cast in their respective counties in accordance with Florida Statutes Section 102.166(5)(c).

Petitioner Bush did not request a manual recount in any Florida county. (Neither did he then or at any time since object to including hundreds of ballots in his favor that were counted by hand initially and in the initial recount.) Instead, on November 11, 2000, a day when he could himself still have sought countywide recounts in most Florida counties, he filed the *Siegel* case (in which Petitioners now seek certiorari before judgment) in the U.S. District Court for the Southern District of Florida seeking to have the federal courts enjoin the ongoing Florida process for counting ballots in its election. In the complaint, and despite the fact that they had neither requested nor been denied manual recounts anywhere in Florida, Petitioners alleged that the manual recounts in four counties, which had not yet begun, would violate Equal Protection, Due Process, and the First Amendment.

On November 13, 2000, following briefing by the parties, a district court properly denied Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction. Through an extensive Order (the "Order"), *Siegel* v. *LePore*, No. 00-9009-civ, 2000 WL 1687185 (S.D. Fla. Nov. 13, 2000), on the grounds that: (a) federal court intervention would inappropriately interfere with Florida's selection of its presidential electors; (b) the Florida statute providing for the manual recounting of election results, Fla. Stat. Ann. § 102.166, is reasonable and non-discriminatory and does not violate the

already been partially dislodged. See Lee Gomes, *Chads - How Tough Are They?*, WALL ST.J., Nov. 22, 2000, at B1.

First or Fourteenth Amendments or result in a constitutional deprivation of any kind; (c) Petitioners' alleged injuries are speculative and far from irreparable; and (d) Petitioners failed to present evidence that they lack an adequate state law remedy. Petitioners' claims, the court held, did not demonstrate "the clear deprivation of a constitutional injury or a fundamental unfairness in Florida's manual recount provision." Order at 24. Moreover, the court noted, Petitioners' allegations that manual ballot recounts are unreliable were similar to the garden-variety election disputes that federal courts routinely decline to consider. Finally, the court noted that it was not in the public interest to prevent the revelation of the results of a recount, truth being an essential element of a democracy. It is in the appeal of that Order denying a preliminary injunction – and only that order – that the *Siegel* Petitioners seek certiorari before judgment in the Eleventh Circuit.[3]

[3] Governor Bush appealed the denial of the preliminary injunction to the United States Court of Appeals for the Eleventh Circuit and sought an injunction pending appeal from that court. After directing that the cause would be heard *en banc* and ordering briefing, the court of appeals denied the emergency motion for an injunction pending appeal. Like the district court, the court of appeals found that states had the primary authority to determine the manner of appointing presidential electors and to resolve controversies concerning that process. Because the State of Florida had in place procedures by which Governor Bush could assert his constitutional claims in the courts of that State, the court of appeals held that he had not demonstrated a substantial threat of irreparable injury sufficient to warrant extraordinary relief. The court of appeals granted, however, Governor Bush's motion for an expedited briefing schedule and later issued a scheduling order. Under the present order, Governor Bush is directed to file a supplemental brief no later than Monday, November 27, 2000, at 12 noon describing the impact of the Florida Supreme Court's opinion on the claims pending before the 11th Circuit. Appellees must file briefs by Tuesday, November 28th at 12 noon and Governor Bush's reply brief is due on Tuesday, November 28th at 10 p.m. If oral argument is deemed necessary, it will be held on Wednesday, November 29th at 1:30 p.m.

D. The Florida Supreme Court Decision at Issue in the *Bush* Petition

Once a county canvassing board certifies an election, it transmits the results to the Florida Secretary of State, who then transmits them to the Elections Canvassing commission so that it can declare the winner for each office. Two Florida statutes purport to define the obligation of the county canvassing boards to transmit their certifications to the Secretary of State. Section 102.111 provides that county returns must be transmitted to the Secretary of State no later than 5 p.m. of the seventh day following the election and that any missing counties ***"shall** be ignored*." By contrast, the later-enacted section 102.112(1) provides that any county returns not received by 5 p.m. on the seventh day "***may** be ignored*." Section 102.112(2) imposes a fine of $200 for each county canvassing board member for each day that county's returns are late. The Florida Supreme Court decision of which the *Bush* Petitioners seek review involves only the interpretation of these provisions of State law.

The lawsuit that forms the basis for the *Bush* petition was filed in the Circuit Court of the Second Judicial Circuit in Leon County on November 13, 2000. Originally brought by Volusia County, but subsequently joined by Palm Beach County, it sought a declaratory judgment that the county was not bound by the November 14, 2000, deadline set by the Secretary of State (Petitioner Bush's state campaign co-chair) for submitting certified vote totals and an injunction prohibiting the Secretary from ignoring election returns resulting from manual recounts authorized by Florida law but submitted after that date. On November 14, 2000, the Leon County court held that although counties did have to comply with the statutory deadline, they could file supplemental returns reflecting the outcome of hand recounts. The Court admonished the Secretary that she could not decide in advance whether to exercise her discretion to accept late-filed returns, but had instead to consider the reasons offered for the late filing before deciding whether it would be accepted or not. The counties appealed to the First District Court of

Appeals.

In response to the Leon County order, Secretary Harris issued a directive requiring that all counties intending to submit late returns inform her of that fact and the reasons for the late returns by 2:00 p.m. on Wednesday, November 15. Four counties did so. After the Secretary concluded that the reasons supplied by the counties for submitting manual recounts were insufficient to justify the acceptance of late returns and again announced that she would not include the results of any manual recounts completed after November 14 at 5:00 p.m., the Florida Democratic Party and Vice-President Gore filed a motion in the Leon County Circuit Court seeking to enforce that court's prior injunction against the Secretary. On Friday, November 17, 2000, the Leon County court announced its opinion that the Secretary's actions had not violated the court's injunction. The Florida Democratic Party and Vice-President Gore appealed, and the First District Court of Appeals certified both appeals for immediate review by the Florida Supreme Court. On Tuesday, November 21, 2000, after full briefing and oral argument, that court issued the decision below.

The Florida Supreme Court found that the questions before it included the following issues of Florida law:

> "Under what circumstances may [a County Canvassing] Board authorize a countywide manual recount pursuant to section 102.166(5); must the Secretary [of State]" and "[State Election] Commission accept such recounts when the returns are certified and submitted by the Board after the seven day deadline set forth in sections 102.111 and 102.112?"

Slip op. at 10. The Court noted pointedly that "Neither party has raised as an issue on appeal the constitutionality of Florida's election laws." *Id.* at n.10.

The Court stated that it would resolve the issues according to familiar principles of statutory interpretation, guided by an appreciation of the importance of the right to vote under Florida

law. "Where the language of the Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code." *Id*. at 24. "[H]owever, chapter 102 is unclear concerning both the time limits for submitting the results of a manual recount and the penalties that may be assessed by the Secretary." *Id.* "In light of this ambiguity, the Court must resort to traditional rules of statutory construction in an effort to determine legislative intent." *Id.*

The Florida Supreme Court applied four traditional canons of construction: "First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general." *Id.* at 24. "Second, it is also well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute." *Id.* at 25. "Third, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision." *Id.* at 26. "Fourth, related statutory provisions must be read as a cohesive whole." *Id.*

Based on these unexceptional principles of statutory construction, the unanimous Court, per curiam, determined that consistent with the permissive language of Section 110.112, the Secretary was not required by the Election Code to ignore the results of manual recounts, even when the recount could not be completed by the seven-day deadline specified in those sections. *Id.* at 18-29.

In light of the "preeminent status the right of suffrage has been consistently accorded in Florida law," *id.* at 30, the Court concluded that "the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances * * * ." *Id.* at 32. In this case, ignoring the returns would be appropriate under Florida law only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process

in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to Section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process pursuant to 3 U.S.C. §§ 1-10. *Id.* at 33.

In light of the unique circumstances of the case, the court invoked its equitable powers to fashion a remedy that would allow a fair and expeditious resolution of the questions presented. *Id.* at 39. After noting that the court at oral argument had inquired whether the presidential candidates were interested in the court's consideration of reopening the opportunity for recounts in additional counties, and that neither candidate requested such an opportunity, *id.* at 40 n.56, the court set deadlines designed to address the state law contest and federal electoral college deadline points noted above. Specifically, the court ruled that the Secretary should accept amended certificates reflecting manual recounts if they are filed by 5:00 p.m. on Sunday, November 26, 2000 (or Monday morning, at the Secretary's option).

D. The Petitions for Certiorari

Pursuant to the Florida Supreme Court's ruling, manual recounts continue in Broward and Palm Beach counties. In their petitions, Petitioners seek to bolster their unusually weak federal claims with wild, irresponsible and utterly unsupported allegations concerning the conduct of those recounts. This Court should be particularly aware that this material, which is untested and which we believe to be utterly false, has never been presented to any court before now and is not a part of the record in either of the cases of which Petitioners seek review. In any event, the conduct of the recounts is of course subject to state court oversight, and Petitioners have available to them ample means under state law to challenge the conduct of any manual recount, including challenges to the inclusion in the final tally of any ballot that they believe should not have been counted, or to the exclusion of any ballot that they believe should have been

counted. See Fla. Stat. § 102.168(3)(c). The state forum provided by statute would be the appropriate place to bring in the first instance any complaints about the conduct of the ongoing manual recounts, rather than raising such complaints before this Court in petitions seeking review of decisions having nothing to do with that question, and in which those complaints were neither raised nor decided below.

In any event, the Court should also rest assured that what is actually happening in Broward and Palm Beach counties is nothing like Petitionerss describe. As recently as last night, Petitioners asked the court of appeals to supplement the record with numerous affidavits and news reports detailing "ballot abuse." Taken collectively, the affidavits allege that "unaccounted for chad" is being dislodged from the ballots as they are counted, that a few ballots were temporarily placed on the wrong pile, that two ballots were folded and a few others twisted, and that one vote counter "smelled rum" from a source he could not identify while in the counting room. Not only are these allegations far too trivial even to approach the standard necessary to assert a constitutional violation or to outweigh the countervailing interest in counting the tens of thousands of ballots not counted by the machines, they are contradicted by facts that are in the record. Moreover, reliable evidence contradicts Petitioners' contention that the counting rooms themselves are circus-like or that the counters are deliberately seeking to alter the ballots. Palm County Canvassing Board Chair Judge Charles Burton testified about the recount process underway in that county before the Palm County Circuit Court on November 22, 2000. In that testimony he confirmed that the atmosphere in the counting rooms was appropriate, that the vote counting was proceeding in an orderly way, and that ballots were not being degraded by the recount process.

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS RAISE NO SUBSTANTIAL FEDERAL CLAIM AND THIS COURT'S INTERVENTION WOULD DISSERVE THE NATIONAL INTEREST.

I. PRINCIPLES OF FEDERALISM COUNSEL STRONGLY AGAINST ACCEPTING PETITIONERS' INVITATION TO INTERFERE WITH FLORIDA'S ELECTORAL PROCESS

The authority of the States to establish principles and procedures for selecting their electors is fundamental to state sovereignty. By expressly providing for state discretion, the Framers constitutionalized each State's right to organize and administer elections in the manner that best reflected the will of its respective citizenry, thereby reinforcing the decentralized nature of American Government. Petitioners ask this Court to intervene in this fundamental state matter and to interfere with the extensive, constitutionally authorized statutory process provided by Florida for selecting presidential electors. There is no basis for that request.

The Florida legislature exercised its constitutional authority by deciding that presidential electors are to be selected by popular vote in accordance with that state's election laws. See Fla. Stat. § 103.011. Moreover, as described above, it enacted a specific set of procedures to be followed for recounting (including manual counting) and confirmation of ballots cast for the purpose of designating presidential electors. See generally Fla. Stats. §§ 102.061, 102.111, 102.112, 102.141, 102.166, 97.021, 101.5603. The manual recount now underway was triggered under state law by anomalies in initial automated counts and was the object of a timely and proper request. Florida has embarked upon an orderly and structured process pursuant to its comprehensive statutory system to enfranchise

voters by attempting to count accurately the votes cast. That process appropriately includes a combination of manual and automated ballot counts. Petitioners ask this Court effectively to substitute its judgment for that of Florida, which enacted detailed election procedures through the lawful exercise of its authority over the appointment of electors. To do so would violate Article II, Section 1, Clause 2, of the U.S. Constitution, ignore 3 U.S.C. § 5, and implicate significant Tenth Amendment concerns.[4]

This lawsuit thus is a patent attempt to federalize a state law dispute over whether a manual recount is authorized and appropriate. The manual recount not only is fully authorized under Florida law, it has now been expressly approved by a unanimous Florida Supreme Court based on its longstanding adherence to the principle of Florida law that the will of the people is paramount. Slip Op. at 9. The Florida Supreme Court has carefully preserved the right of Petitioners or others to contest the certification of an election pursuant to Florida law. Intervention by this Court in this ongoing process could cause irreparable delay at a critical moment and would work a significant intrusion into a matter – the selection of electors – that is both fundamental to state sovereignty and constitutionally reserved to the States.

[4] An injunction prohibiting a manual recount would do more than *forbid* the State from engaging in a challenged practice. Given the State's obligation under Article II of the Constitution to compose a slate of electors, such an injunction would affirmatively *force* the State to conduct its vote count and verification according to a particular federal vision of how that count and verification should proceed. Cf. *Printz* v. *United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). Indeed, the very suggestion that federal courts might reach into state governmental machinery to tell the states how to make and interpret their own laws would fly in the face of basic principles of federalism. See *New York* v. *United States*, 505 U.S. 144, 178 (1992) (Congress may not command states to legislate).

II. NOTHING IN FEDERAL LAW PROHIBITS THE FLORIDA SUPREME COURT'S ROUTINE INTERPRETATION OF FLORIDA'S ELECTION LAW

Petitioners make the stunning argument that federal law somehow disables the Florida courts from playing their ordinary role in this case of interpreting Florida law, and that federal law overrides the Florida court's determination that the seven-day deadline contained in Fla. Stats. §§ 102.111 and 102.112 does not stop the manual recounting of ballots or the inclusion of those recounts in the final tally. See *Bush* Pet. at 12-18. The flimsiness of this argument is self-evident.

1. Title 3. The federal statute principally invoked by Petitioners, 3 U.S.C. § 5, provides that each state's procedures for settling "any controversy or contest concerning the appointment of all or any of the electors" shall be conclusive with respect to the choice of that state's electors if the state procedures were "provided, by laws enacted prior to the day fixed for the appointment of the electors." Petitioners argues that the decision of the Florida Supreme Court somehow violated this statute by creating a "new legal rule[]" that would apply "retroactively." *Bush* Pet. at 13-17.

To begin with, Petitioners' argument is based on a flat misstatement of the requirements of the statute, which in fact provides that disputes must be resolved "by judicial or other methods or procedures" and "provided[] by laws enacted prior to" election day. There thus is literally nothing to Petitioners' argument. The laws of Florida, of course, established the state judiciary as the mechanism for deciding "controvers[ies] and contest[s]" about all questions of Florida law, and not just those concerning appointment of presidential electors. See Fla. Const. art. V, § 1 ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts."); *id.* art. V, § 20(c)(3) (granting circuit courts original jurisdiction "in all cases in equity" and reaffirming the Supreme

Court's pre-existing jurisdiction).

In any event, the decision by the Supreme Court of Florida amounts to an ordinary act of statutory interpretation of a law enacted prior to the election, not to a new "enactment." This is clear from even a cursory review of the opinion of the Florida Supreme Court below. The court dealt with the conflict between the provision of Florida law that said that returns filed after seven days "shall" be ignored, and the parallel provision saying that they "may" be ignored, by giving credence to the more specific, and the more recent, provision, a canon of construction certainly familiar to this Court as well. See Slip Op. at 24-25. The court also recognized that the provision for fines for late submission of returns implied that they could, indeed, be accepted late. *Id.* at 27. It concluded, in light of the state constitution and the provisions outlining detailed procedures for manual recounts, that the Secretary's discretion to ignore the results of those manual recounts was strictly limited. *Id.* at 30-35. We respectfully submit that the decision below is persuasive, but whether one agrees or disagrees with it, it cannot be denied that it is an ordinary interpretation of a complex statutory scheme.

Thus, the questions purportedly framed in the petition are not in fact presented by this case. The Florida Supreme Court's routine interpretation of its statutory scheme does not "change the rules" in any way that implicates federal law. Petitioners seek to transform their disappointment with the Florida Supreme Court's authoritative interpretation of Florida law into a "constitutional" claim by arguing that it amounted to a change in the rules after the fact. If they were correct that they thereby stated a constitutional claim, every disappointed state court litigant would be able to bring a similar challenge in federal court. Permitting our state courts to interpret their laws – in ways that will, by definition, disappoint one or another litigant – of course does not violate the federal Constitution. At bottom, Petitioners' contention is that the Florida Supreme Court committed an error of state law. This argument does not

describe post-election judicial legislation, so as to implicate 3 U.S.C. § 5 or Article II, § 1, nor does the argument state a due process claim. A "'mere error of state law' is not a denial of due process." *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982) (quoting *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948)). [5]

2. Article II. Petitioners' argument that the delegation of authority to the state "Legislature" in Article II eliminates the state courts' power to interpret state law amounts to much the same thing: a request that this federal court alter the State Supreme Court's interpretation of state law. See *Bush* Pet. at 19 (repeating Petitioners' unavailing argument before the State Supreme Court about what the "manner" of appointed electors is under state law). The delegation, like other delegations of authority to the States, see U.S. Const. art. I, § 4, means that the procedure for appointing Electors is a matter of state law, the ultimate meaning of which must be determined by state, not Federal, courts.

III. THE FLORIDA RECOUNT PROVISIONS ARE UNEXCEPTIONAL; PETITIONERS' SUBSTANTIVE CONSTITUTIONAL CHALLENGE TO THEM IS INSUBSTANTIAL

Petitioners next allege that the manual recounts now being conducted in accordance with Florida law are "selective, arbitrary, and standardless," and thus violate the federal Constitution. See *Siegel* Pet. at 15. The Florida provisions for manual recounts are, however, utterly unexceptional. To permit

[5] "[T]he concept of the separation of powers embodied in the United States Constitution is not mandatory in state governments." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (1957). Indeed, "[i]t would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight states." *Id.* at 256 (Frankfurter, J., joined by Harlan, J., concurring in the judgment).

the government of each county to conduct the election within that county has a long and uninterrupted history in this Nation, going back to the founding. The availability of the manual recount as a standard post-election procedure is a long-standing feature of Florida law, and of the law of other States,[6] and has been repeatedly used as part of Florida's system of electoral checks and balances to ensure that all lawfully cast ballots are counted.[7] The Florida scheme provides citizens of each county, and candidates for office within each county, with equal rights. The manual recount procedure violates neither Equal Protection, nor Due Process, nor the First Amendment.

1. Equal Protection. The weakness of Petitioners' constitutional claim is reflected in the imprecision with which

[6] At least 20 other states have enacted statutes allowing or even – as in Texas – encouraging the use of manual recounts to back up punch-card tabulation systems. See Cal. Elec. Code § 15627; Col. Rev. Stat. § 1-10.5-102(3); 10 Ill. Comp. Stat. § 5/24A-15.1; Ind. Code § 3-12-3-13; Iowa Code § 50.48(4); Kan. Stat. § 25-3107(b); Md. Code § 13-4; Mass. Gen. Laws ch. 54, § 135B; Minn. R. 8235.1000; Mont. Code § 13-16-414(3); Neb. Rev. Stat. § 32-1119(6); Nev. Rev. Stat. § 293.404(3); N.J. Stat. § 19:53A-14; 25 Pa. Code § 3031.18; S.D. Admin. R. 5:02:09:05(5); Tex. Elec. Code § 212.005(d); Vt. Stat. § 2601l; Va. Code § 24.2-802(C); W. Va. Code § 3-4A-28(4); Wis. Stat. § 5.90.

[7] Indeed, the fact that counties have different ballot marking and counting systems justifies the need for statutory checks and balances such as a manual recount process. For example, most counties in Florida utilize an optical scanning vote count system. That system performed with great accuracy during the presidential race, resulting in only a 0.4% undervote rate (4 in 1000 ballots). (See Decl. of Jon Ausman, App. of Appellee-Intervenor Florida Democratic Party in *Siegel*, No. 00-15981-C (CA11), Tab 13, ¶ 8.) In contrast, punch card systems such as those used in Palm Beach, Broward and Miami-Dade counties experienced a 3.2% undervote rate (32 in 1000 ballots) in the presidential race. (Decl. of Jon Ausman, App. Tab 13, ¶ 9.) The manual recount process can ameliorate some of the disparity created by the use of different marking and counting equipment. Such a system not only does not violate the Equal Protection Clause, but it also enhances the equality of the voting process.

they identify the source of the alleged rights at issue. In *Siegel*, their first argument is that the recounts violate "Equal Protection," ostensibly because the recounts that are underway will "dilute" the votes of certain voters "based on the counties in which they live." *Siegel* Pet. at 17.

There is no principle of Equal Protection that is violated by the Florida procedure. The "dilution" cases Petitioners cite, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964), involve the one-person one-vote principle under which voters from different districts cannot be given votes of unequal "weight." This issue is not even presented in an at-large election like the instant one where, although the elections are conducted by individual counties, the winner is determined based on his or her statewide vote. When the state undertakes procedures to ensure that qualified voters' votes are counted, the previously counted votes are not, of course, "diluted" at all. And, as this Court has previously recognized, manual recount procedures, like those that are included in Florida law, are a completely ordinary mechanism for ensuring the accuracy of vote-counts in close elections. See *Roudebush* v. *Hartke*, 405 U.S. 15, 25 (1972) ("A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, §4.").[8]

[8] Petitioners' assertion of a conflict with *Roe v. Alabama*, 43 F.3d 574 (CA11 1995) ("*Roe I*"), and *Roe v. Alabama*, 68 F.3d 404 (CA11 1995) ("*Roe III*"), also is misplaced. In these cases, an Alabama state court ordered the counting of contested absentee ballots that were neither certified nor notarized as required by Alabama's absentee ballot law and, under standard Alabama practice, would have been excluded. The unlawful vote dilution in the *Roe* cases is quite different from this case. The availability of the manual recount as a standard post-election procedure is a long-standing feature of Florida law, and has been repeatedly used as part of Florida's system of electoral checks and balances to ensure that all *lawfully* cast ballots are counted. Plaintiffs make no allegation that unlawful ballots are now being counted in violation of any statute or general practice of the State of Florida.

Unlike *Roe I*, 43 F.3d at 581, there is absolutely no "post-election departure from previous practice" in Florida, and Plaintiffs cannot show that

Petitioners also argue that it is constitutionally impermissible for the manual recounts to proceed "selective[ly]" in only certain Florida counties. See *Siegel* Pet. at 18. If Petitioners mean to say that every county must count its voters' votes in precisely the same manner as every other county, they are obviously wrong. As they do in Florida, different counties within states routinely use different equipment and different ballots for the conduct of their elections. This obviously does not systematically "dilute" the votes of particular counties in any way that violates the Equal Protection Clause.

Petitioners also argue that Florida cannot permit recounts limited to certain counties only. But the only relevant case they cite, *O'Brien* v. *Skinner*, 414 U.S. 524 (1974), involved incarcerated prisoners who were denied the right to vote altogether based solely on their county of residence. *O'Brien* stands only for the unremarkable proposition that voters cannot be denied the right to vote solely because of their county of residence. The manual recount provisions of Florida law do not work any such type of irrational discrimination: Florida law does not specify that recounts should occur only in certain counties. Nor were the counties now conducting the manual recounts chosen arbitrarily or on any discriminatory basis. Florida law provides a right to request a manual recount in *any* county in which a candidate has a reason for believing that such a recount might reveal "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). Each candidate and each county was treated identically. Each candidate was empowered by statute to request

a manual recount to ensure accuracy will cause any vote dilution. The fact that different components of the verification process may be activated in different counties does nothing to cause votes in other counties to go uncounted. The Equal Protection Clause does not require that all votes be counted by machines or registered in a certain manner. Petitioners' equal protection claims are tantamount to contending that unless each county's marking and counting systems are identical in every way there is violation of constitutional rights.

manual recounts in any county.

Democrats requested manual recounts in several counties in which the initial machine recount indicated a problem with the machines reading the ballots serious enough that it might affect the outcome of the election. Governor Bush made the conscious, political choice not to request manual recounts in any county, a choice that manifestly does not create a constitutional violation conveniently inuring to his benefit. Indeed, as the Florida Supreme Court pointedly noted, Governor Bush declined the suggestion that the State reopen an opportunity for seeking a manual recount in additional counties. See Slip Op. at 40 n.56.

Even if Petitioners had standing to allege a denial of equal protection in the failure to conduct a recount in the counties in which it was not requested, their equal protection claim would be unsupportable in light of the entirely reasonable basis for the distinction in treatment between the ballots of the various counties. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983) (with respect to regulation of elections, "State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions"). This is not a circumstance where "the votes of similarly situated voters [are given] different effect based on the happenstance of the county or district in which those voters live." *Siegel* Pet. at 17. The basis for determining where recounts are conducted was not arbitrary. Where there was a request for a manual recount, it was granted. Where there was no request, it was not. Nothing could be more reasonable, or less discriminatory.[9]

[9] Petitioners also allege that the use of different standards in different counties for determining which ballots to count also amounts to unconstitutional discrimination. *Siegel* Pet. at 18. Despite repeated conclusory allegations to the contrary, all counties are using the *same* standard, the intent of the voter. See Fla. Stat. § 102.166(7). Even if this standard were interpreted slightly differently in different counties, petitioners would have no more valid an Equal Protection challenge than they would against different counties' use of different balloting equipment. In any event, because this standard is included in state law, its meaning – and any conflicts

2. <u>Due Process.</u> Petitioners' due process claim is equally insubstantial. They argue that the manual recount statute prescribes "no meaningful standards" for "determining whether and how" to conduct a manual recount, and that the statute thus invades a "liberty or property interest * * * in an arbitrary and capricious manner." *Siegel* Pet. at 19-20. The premise of this argument, that there are no meaningful standards for officials conducting recounts, is wrong as a matter of Florida law.[10]

Petitioners assert that the county canvassing board's discretion to order a manual recount is absolutely "standardless," and that this violates due process. Petitioners do not, however, allege either that the decisions to recount were made on any arbitrary or improper basis, or that they were denied recounts elsewhere on any such basis. Their complaint instead is that the mere grant of discretion to the county canvassing commissions contained in the statute itself violates the Constitution. See *Barclay's Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 315 (1994) (addressing such a claim).

To prevail on such a facial challenge, Petitioners would have to establish that there are *no* constitutionally valid applications of Florida's statutory process for manual recounting. See *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 11 (1988). Petitioners have made no effort to meet this burden, and they could not do so if they tried. For example, it could not be seriously contended that the Florida statute would be unconstitutional were a county canvassing board to direct a

about it – may ultimately be resolved by the Florida Supreme Court.

[10] It must be remembered that Petitioners are not making a delegation doctrine challenge to the statute, alleging that there is no "intelligible principle" to cabin the administrative agency's discretion. See *Loving v. United States*, 517 U.S. 748, 771 (1996) (quoting *Hampton v. United States*, 276 U.S. 394, 409 (1928)). Nor could he make one here, since the federal Constitution does not constrain the state governments with federal separation of powers principles as such. See *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (plurality op.); *id.* at 235 (concurring opinion).

manual recount upon its written, verified conclusion that the county's vote-counting devices had malfunctioned (a circumstance that came to pass in Volusia County). See *Siegel*, 2000 WL 1687185, at *3. Petitioners' facial challenge is entirely groundless.

Furthermore, the statute contains standards sufficient to defeat any due process challenge. The statute makes clear that the purpose for the manual recount is to determine if there is "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). This standard provides the requisite guidance for the county officials' exercise of their discretion whether or not to order a manual recount. As the statute makes clear, the county officials' discretion is not unbounded; rather, they must consider requests for manual recounts in light of this standard: The statute explicitly provides that any request for a manual recount must "contain a statement of the reason the manual recount is being requested." *Id.* § 102.166(4)(a). And, if a manual recount *is* conducted, the county canvassing board is required to take action if, but only if, "the manual recount indicates an error in the vote tabulation which could affect the outcome of the election." *Id.* § 102.166(5).

In light of these provisions, a decision to grant a manual recount on some basis other than an allegation related to the possibility that there might be an error in the vote tabulation would be an abuse of discretion. By the same token, if a candidate provided substantial support for such an allegation, but the county canvassing board denied his or her request for a manual recount, this, too, would amount to an abuse of discretion. And, in either case, an aggrieved party might properly seek relief in state court. This suffices to demolish any claim that the grant of discretion in the statute violates due process. See *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (due process offended, even in context of control of primary conduct, only by statutes that provide "no standard" for the exercise of official discretion).

Nor do county officials have standardless discretion in determining how to count individual ballots during the manual recount. The touchstone under Florida law is the voter's intent. Indeed, Florida statutory law provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Fla. Stat. § 101.5614(2)(a). The manual recount provision expressly provides that "[i]f a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent." Fla. Stat. § 102.166(7). This is a familiar standard used throughout the United States for determining whether and how to count ballots. See, *e.g.*, *Delahunt* v. *Johnson*, 671 N.E.2d 1241 (Mass. 1996); *Pullen* v. *Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990); *Stapleton* v. *Board of Elections*, 821 F.2d 191 (CA3 1987); *Hickel* v. *Thomas*, 588 P.2d 273, 274 (Alaska 1978); *Wright* v. *Gettinger*, 428 N.E.2d 1212, 1225 (Ind. 1981).

Like all issues of compliance with voting laws, the meaning of that standard is "ultimately a judicial question." *State ex rel. Nuccio v. Williams*, 120 So. 310, 314 (Fla. 1929). Thus, there is no unacceptable risk that county officials will apply this test subjectively, arbitrarily, or inconsistently. And, in any event, any objection to the way in which a particular ballot has been counted in the application of the intent of the voter standard can be brought in state court, and any question about the meaning of the standard can ultimately be resolved before the State Supreme Court, whose decision will of course have uniform application throughout the State.

3. <u>First Amendment.</u> Nor, for the same reasons, is there any substance to Petitioners' claim of "unconstrained" or "standardless" discretion over the implementation of laws that touch upon First Amendment rights. *Siegel* Pet. at 23. As *Anderson* makes clear, regulations of elections are not judged by the same standards as regulations that abridge First Amendment rights of Free Speech. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and

honest and if some sort of order, rather than chaos, is to accompany the democratic processes." 460 U.S. at 788 (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)); see also *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992) ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest * * * would tie the hands of States seeking to assure that elections are operated equitably and efficiently."). Petitioners' citation to *City of Lakewood* v. *Plain Dealer*, 486 U.S. 750, 763 (1988), see *Siegel* Pet. at 23, is therefore completely inapposite even if *City of Lakewood*'s demand for constraints on discretion in the licensing of primary conduct protected by the First Amendment could be extrapolated to the completely different context of decisionmaking internal to the government in the search for accuracy in processing ballots – an extrapolation this Court's precedents do not support. Cf. *Bowen* v. *Roy*, 476 U.S. 693, 700 (1986) ("The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.").

Whatever the standard, Florida's manual recount provisions survive it, because they do not provide Florida officials with unconstrained discretion and give such officials *no* power whatever to deny any candidate or voter access to the ballot or the franchise. The statutory standards, enforceable by Florida courts, are sufficient to defeat Petitioners' purported First Amendment challenge.

4. Additional Claims In The *Siegel* Action. Finally, the question that Petitioners purport to present in the *Siegel* matter simply cannot be resolved at this stage given the procedural posture of the case, which the petition notably fails to address. The only issue before the Eleventh Circuit – and therefore the only question that could be presented in this Court *via* the Petition for Certiorari Before Judgment – is whether the district court properly denied Petitioners' motion for a preliminary injunction on the then-existing record. See *SunAmerica Corp.*

v. *Sun Life Assur. Co.*, 77 F.3d 1325, 1333 (CA11) (standard governing such an appeal), *cert. denied*, 519 U.S. 822 (1996); see also *FTC* v. *Affordable Media, LLC*, 179 F.3d 1228, 1235 (CA9 1999) (same). Any purely legal claims asserted by Petitioners that could even arguably be the basis for injunctive relief are meritless for the reasons described above, but Petitioners' fact-based claims regarding the course of the manual recounts, on which the petition principally rests, are not even properly presented. Just as important is the fact that Petitioners nowhere contest the conclusion, supported by the district court's extensive analysis and citation to precedent and the court of appeals' subsequent order denying an injunction, that Petitioners are free to pursue their claims in state, not federal, court.

And, as an entirely separate matter, the *Siegel* Petitioners' fact-bound claims necessarily depend on non-record assertions.[11] Contrary to the Rules of Civil and Appellate Procedure, as well as the clear intent of the Rules of the Supreme Court, Petitioners apparently attempted (but thus far have failed) to file in the court of appeals for use in this Court a barrage of heavily contested affidavits untested in the district court or any other forum, that assertedly establish their federal law claims.[12] If this Court were

[11] That the case is factbound alone of course counsels against certiorari, particularly given that the question relates to "fact-bound legal consequences of contested district court findings not yet reviewed by the court of appeals." *Kungys* v. *United States*, 485 U.S. 759, 773 n.6 (1988); see also *Heck* v. *Humphrey*, 512 U.S. 477, 480 (1994); *Hayes* v. *Florida*, 470 U.S. 811, 814 n.1 (1985); *Packwood* v. *Senate Select Comm. Ethics*, 114 S. Ct. 1036, 1037 (1994) (Rehnquist, C.J., in chambers).

[12] Petitioners' attempt to purportedly "supplement the record" is impermissible under either FRAP 10(e), *Hoover v. Blue Cross & Blue Shield,* 855 F.2d 1538, 1543 n.5 (CA11 1988), or the court of appeals' inherent authority to supplement the record, *Dickerson v. Alabama*, 667 F.2d 1364, 1367 (CA11 1982) (limited supplementation permitted only because substantive issues were not in serious dispute, remand would serve no purpose, and parties were clearly on notice of the evidence at trial).

Moreover, contrary to the impression left by the Petition, Petitioners first

to review those claims, the parties apparently would conduct a preliminary injunction hearing as an original matter in this Court (battling affidavit-by-affidavit and expert report-by-expert report) contrary not only to sound principles of judicial administration and settled jurisdictional prerequisites, but also to simple common sense. The district court directed Petitioners to file their claims in Florida's state courts and develop a record there; Petitioners refused. Alternatively, Petitioners could have developed a record in federal district court to support a request for a permanent injunction; they refused, abandoned proceedings in that forum, and rushed to the Eleventh Circuit instead. The only reasonable conclusions from this course of conduct are (i) that Petitioners have thus far delayed resolution of their claims by consciously avoiding development of their factual claims in the appropriate trial courts, all of which have demonstrated a near-Herculean willingness to consider and dispose of such claims expeditiously, and (ii) that if they wish to pursue such allegations, they should do so by returning to those fora and pursuing appropriate, expeditious appeals.

All of the foregoing, of course, also demonstrates that this is not one of those very rare cases in which it would be appropriate for this Court to grant certiorari prior to the court of appeals rendering judgment (particularly given the highly expedited briefing schedule already set by that court, see *Aaron* v. *Cooper*, 357 U.S. 566, 567 (1958)).

filed the Petition in this Court and only *later* sought (unsuccessfully so far as we are aware) to file in the Eleventh Circuit their principal "Motion to Supplement" the record. This is nothing more than an effort (i) to mask the reality that Petitioners are seeking to introduce a mountain of heavily contested factual material in this case for the first time *in this Court*, and (ii) to avoid the "clearly erroneous" standard that properly would be applied to factual findings by the trial court in this context, *SunAmerica Corp.*, 77 F.3d at 1333. (Well after being served with the petition, Respondents' counsel *still* had not been served with contents of putative record material.)

CONCLUSION

It is precisely in a case such as this, where the Constitution specifically delegates authority to the States – and where the attention of the Nation is focused on the proceedings – that this Court's obligation is at its peak to preserve the principles of federalism that it has articulated and enforced. These petitions represent a bald attempt to federalize a state law dispute over whether a manual recount is authorized and appropriate. Intervention by this Court in this ongoing process would work a significant intrusion into a matter – the selection of electors – that is both fundamental to state sovereignty and constitutionally reserved to the States. Because there is nothing even approaching a clear showing of a constitutional violation requiring redress by this Court, the petitions for writs of certiorari should be promptly denied.

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No.

IN THE

Supreme Court of the United States

NED L. SIEGEL, ET AL.,

Petitioners,

v.

THERESA LEPORE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the use of selective, arbitrary, and standardless manual recounts that threaten to overturn the results of the election for President of the United States violates the Equal Protection Clause, the Due Process Clause, and the First Amendment.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties in the court below:

Ned L. Siegel, Georgette Sosa Douglas, Gonzalo Dorta, Carretta King Butler, Dalton Bray, James S. Higgins, and Roger D. Coverly, as Florida registered voters; Governor George W. Bush and Dick Cheney, as candidates for President and Vice President of the United States of America; Theresa LePore, Charles E. Burton, Carol Roberts, Jane Carroll, Suzanne Gunzburger, Robert Lee, David Leahy, Lawrence King, Jr., Miriam Lehr, Michael McDermott, Deannie Lowe, and Jim Ward, in their official capacities as members of the County Canvassing Boards of Palm Beach, Miami-Dade, Broward and Volusia Counties, respectively; Florida Democratic Party; Robert A. Butterworth, as Attorney General of Florida; Kenneth A. Horowitz, Catherine Ann Bowser, Sylvia Szymoniak, Joseph Morris, Karilee Halo Shames, Leona Jacques, and Laura Hamilton, as Palm Beach County voters.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ned L. Siegel, Georgette Sosa Douglas, Gonzalo Dorta, Carretta King Butler, Dalton Bray, James S. Higgins, and Roger D. Coverly (collectively, the "Voter Plaintiffs"), George W. Bush, and Dick Cheney respectfully pray that a writ of certiorari before judgment be issued in this case, which is now pending before the United States Court of Appeals for the Eleventh Circuit. Petitioners are Florida voters and the Republican Party candidates for President and Vice President of the United States. Those candidates—George W. Bush and Dick Cheney—have received the most votes cast by Floridians in the Presidential election held November 7, 2000. Nonetheless, in clear violation of the federal Constitution, the Supreme Court of Florida has barred the responsible state officials from certifying Governor Bush and Mr. Cheney as the prevailing candidates in the election in accordance with the popular vote, thereby placing in jeopardy the ability of Florida's duly appointed presidential electors to cast their votes on December 18, 2000. Petitioners seek this Court's immediate review of the unconstitutional procedures that are currently being used in Florida in an apparent effort to change the outcome of the Presidential election. Time is of the essence in this case, which raises important questions of historical significance.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit denying an injunction pending appeal (App., infra, 37a-46a) is not reported. The opinion of the United States District Court for the Southern District of Florida denying a preliminary injunction (App., infra, 1a-26a) is not reported.

JURISDICTION

The judgment of the district court was entered on November 13, 2000. App., infra, 26a. A timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit was filed on November 14, 2000. App., infra, 28a.

This petition is filed under this Court's Rule 11. The court of appeals, in which this case has been duly docketed, has entered interim orders in this case but has not yet entered judgment, and has directed all parties to file additional briefs during the week of November 27, 2000. The court today announced that if oral argument is scheduled, it would take place on November 29, 2000. Due to the importance and time-sensitivity of this appeal, as recently heightened by the decision of the Supreme Court of Florida in a related case, petitioners are seeking issuance of a writ of certiorari before judgment in the court of appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (which provides that this Court may exercise certiorari jurisdiction "before or after rendition of judgment or decree" by a federal court of appeals). See also 28 U.S.C. § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment").

Petitioners recognize that this Court only rarely grants certiorari before judgment. This case, however, is extraordinary. For two weeks, the outcome of the November 7, 2000 presidential election has been uncertain due almost entirely to the lack of a certified winner in the State of Florida. This is true despite the fact that Gov. Bush and Mr. Cheney have garnered more of the votes cast in Florida than their opponents, as initially counted and as recounted (and, in many cases, recounted again and again). Nevertheless, state election officials have been precluded by the state courts from certifying the results of the election (thus preventing any contests

from being lodged under Florida law) and documenting the appointment of electors in accordance with the vote, pending the completion of a selective, arbitrary, and standardless manual recount of ballots cast in only three heavily populated, predominantly Democratic counties selected by Florida Democrats.

This Court's Rule 11 recognizes that certiorari before judgment may be granted "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." For the reasons outlined above and discussed in more detail below, this is plainly such a case. The election of our Nation's highest elective office may turn on the Court's resolution of the issues presented. And, due to the protean nature of the state-court proceedings, this Court's immediate intervention is warranted in order to ensure that the rule of law is adhered to in this time of great national concern. As the intense public interest in this issue will attest, this case presents questions of similar magnitude to those in which the Court has previously granted certiorari before judgment. See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 668 (1981); United States v. Nixon, 418 U.S. 683, 686-87 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Ex parte Quirin, 317 U.S. 1, 18-19 (1942).

Petitioner George W. Bush has separately petitioned this Court to review the November 21, 2000 decision of the Florida Supreme Court raising closely related questions. Bush v. Palm Beach County Canvassing Board, No. 00-____ (filed contemporaneously herewith). In the event the Court grants certiorari in that case, it would be appropriate also to grant review in this case in order that all the issues can be resolved at once. See Taylor v. McElroy, 360 U.S. 709, 710 (1959); Brown v. Board of Education, 344 U.S. 1, 3 (1952).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Pursuant to this Court's Rule 14.1(f), the provisions of Florida election law involved in this case, including Fla. Stat. §§ 102.111, 102.112, 102.141(4), 102.166, 102.168, and 106.23, are set forth at App., infra, 37a-46a.

STATEMENT OF THE CASE

This petition seeks to remedy Florida's widespread and systemic infringement upon and dilution of the right to vote in the November 7 presidential election in that State. The right to vote is the preeminent constitutional right in this nation; it is preservative of all rights. And the right to vote in a presidential election implicates uniquely important national interests; it is the most important of all votes for American citizens. The unequal, constantly changing, and standardless selective manual vote recount underway for the past two weeks in Florida is a patently unfair process that is having an impact far beyond Florida's borders, and that cries out for correction by this Court.

The essential facts are not reasonably disputable. A routine tabulation of Florida's presidential election ballots by conventional means and a recount by the same time-tested objective methods revealed that the Republican candidates held the lead. At that point, the Democratic Party demanded manual recounts in four carefully selected, heavily populated, Florida counties where the tabulated votes in the election had been predominately Democratic.

Although Florida law calls for certification of votes seven days after the election (except for overseas absentee ballots), those manual recounts are still underway 15 days later in three of those counties. The recounts are being conducted without uniform standards and differently in each of the three counties. They include pronouncements by persons with a stake in the outcome of the election of the ambiguously revealed "intentions" of thousands of individual voters. Two counties initially voted not to conduct county-wide recounts and then reversed those decisions in the face of pressure from interested parties.

Standards for evaluating ballots have changed repeatedly during the recounts. Indeed, after tabulating as proper votes only punch card ballots that had been perforated by voters, certain county officials yielded— two weeks after the election— to demands by Democratic Party officials for the adoption of yet another new standard which would permit local officials to validate ballots with mere "discernible indentations" ("dimpled chads"). On November 20, the Florida Democratic Party actually asked the Florida Supreme Court to fashion even more expansive new standards de novo for the recounting of the ballots in the counties it had singled out for special attention. This, presumably, would require starting the process over again.

The repeated processing of ballots by machines (at least three times in one county), and by hand manipulation by numerous persons, is unavoidably causing

physical degradation of ballots, changing them irrevocably. And selective manual recounts inevitably evaluate votes considerably more permissively in some counties than in others.

Whatever Florida's interests in the scrupulous evaluation of ballots cast in its election, those interests are not being served by a selective, capricious, and discriminatory process that sacrifices individual constitutional rights, compelling interests in the finality of the vote-tabulating process, and the integrity of our Nation's most important election in order to fulfill the ambition of one political party to secure a more favorable outcome.

A. Factual Background

1. The Presidential Election

On November 7, 2000, the quadrennial Presidential election was held throughout the United States. In Florida, voters cast ballots for several offices, including for the appointment of electors for President and Vice President of the United States. App., infra, 3a. The ballots counted in Florida showed that Governor George W. Bush and Dick Cheney received more votes than their opponents, Vice President Al Gore and Senator Joseph Lieberman, by a margin of 1,784, or 0.0299% of the total Florida vote. Id.

Florida law provides that, if a candidate is defeated or eliminated by one-half of one percent or less of the votes cast for an office, the State's Elections Canvassing Commission shall order a recount of the votes cast with respect to that office, unless the defeated candidate "request[s] in writing that a recount not be made." FLA. STAT. § 102.141(4) ("the .5% recount"). The 5% recount is performed in the same manner as the original count. Id. § 102.141(4); see also id. §§ 97.021(2)(c), 101.5603, 102.166(3)(c); App., infra, 5a.

On November 8, pursuant to Fla. Stat. § 102.141(4), each of the canvassing commissions of Florida's 67

counties began a recount of the returns. App., infra, 5a; Record on Appeal in the United States Court of Appeals for the Eleventh Circuit ("C.A. Rec.") 2 at 7 ¶ 30. At the completion of that recount, although the numerical totals were different, the outcome was the same as the initial vote count: The Bush-Cheney ticket prevailed over the Gore-Lieberman ticket. See id.

2. The Selective Manual Recounts

After the second statewide counting of ballots, on or about November 9, 2000, Florida Democratic officials filed requests for manual recounts of ballots in Broward, Miami-Dade, Palm Beach, and Volusia Counties. App., infra, 5a.[1]

Florida Statutes § 102.166(4) provides that any candidate or his party (but not a voter) may file a written request with a county canvassing board for a "manual recount" within 72 hours after midnight of the date of the election or prior to the time the canvassing board certifies the results of the election, whichever occurs later. Fla. Stat. § 102.166(4) (emphasis added); see App., infra, 5a. It further provides that the request for a manual recount must "contain a statement of the reason the manual recount is being requested." Fla. Stat. § 102.166(4)(a).

As of November 7, Florida statutes set forth no standards to guide county canvassing boards in determining whether to initiate a manual recount. See Fla. Stat. § 102.166(4)(c) (stating simply that "[t]he county

[1] Petitioners acknowledge and are considering an appropriate response to the arguments below of the members of the Volusia County Canvassing Board, that they have already certified results to the Secretary of State and that Volusia does not use punch card ballots.

canvassing board may authorize a manual recount"); see also App., infra, 13a-14a. Respondent County Boards have therefore asserted and exercised essentially limitless discretion in making that decision.[2]

Florida law provides that "[t]he manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate." Fla. Stat. § 102.166(4)(d); see App., infra, 5a, 13a-14a. "The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts." Fla. Stat. § 102.166(4)(d). If the board concludes that this manual recount indicates an error in the vote tabulation that could affect the outcome, the county canvassing board has three options: (a) correct the error and recount the remaining precincts

[2] Under Florida law as it existed prior to the election, the "judgments" of the Secretary of State in fulfilling her specifically charged duties in the election process "are entitled to be regarded by the courts as presumptively correct." Krivanek v. The Take Back Tampa Political Comm., 625 So. 2d 840, 844 (Fla. 1993) (quoting Boardman v. Esteva, 323 So. 2d 259, 268 n.5 (Fla. 1975); see also Greyhound Lines, Inc. v. Yarborough, 275 So. 2d 1, 3 (Fla. 1973) ("This Court has often reiterated the principle that a construction of a statute by the administrative body in whom authority to administer is reposed is entitled to great weight and should not be overturned unless clearly contrary to the language of the statute.") The Florida Supreme Court's post-election decision in Palm Beach County Canvassing Bd. v. Harris, however, has reversed that preexisting doctrine of Florida law, overridden the Secretary's decision regarding the law governing the acceptance of late-filed returns, and now arrogates to the state courts the new-found authority to legislate exceptions to state election law.

by machine; (b) ask the Florida Department of State to verify the tabulation software used; or (c) manually recount all ballots. Fla. Stat. § 102.166(5)(a)-(c); App., infra, 14a. As of the date of the election, Florida law did not specify criteria for determining which of these options to select in a particular case. The recount process authorizes the county canvassing board to determine the voter's "intent," but no statutory standards were set forth to guide or constrain such determinations, leaving such decisions to ad hoc determinations by canvassing boards.

On Saturday, November 11, 2000, the Palm Beach County Canvassing Board began a manual review of the ballots cast in the four precincts selected for review. That review of only 1 percent of the ballots cast in Palm Beach continued until the early morning hours of Sunday, November 12, 2000. C A. Rec. 11 at 2. Errors and irregularities of various sorts marked the process. Observers noted, for example, that the ballot cards were laid carelessly about the counting room and that security precautions were lacking. Id. One member of the Palm Beach Board, Carol Roberts, was overheard asking only Democratic observers for their views on ballot cards, thus bringing only those monitors of one party into the decision making process. Id. at 5-6.

As manual recounts commenced and recommenced in the other three selected counties, the standardless, capricious, and continuously changing nature of the manual recounts became even more pronounced. Far from enhancing the accuracy or reliability of the results produced by two statewide machine counts, selective manual recounts conducted in this manner serve only to undermine confidence in the outcome and provide limitless opportunity for error, manipulation, and inconsistent decisions regarding the interpretation of ballots.

1. Physical Manipulation And Degradation Of Ballots

The selective manual recount process has unquestionably damaged ballot integrity. Representatives of the County Respondents have admitted that the more the ballots are handled, the more chads will fall off, making it more likely that the ballot recount (and any future recount under constitutional standards) will produce different numbers from this cause alone. CA. Rec. 6 at ¶ 6c. Observers of the manual recounts have consistently reported that ballots have been bent, prodded, poked, and aggressively handled. E.g., CA. Rec. 11 at 5-7. Ballots have been twisted, rumpled, creased, and dropped; some have been stained with ink, poked with pens, and crushed. CA. Rec. 11 at 25 ¶ 7 ("I personally observed Canvassing Board counters 'twisting' and otherwise manipulating the paper ballots in an attempt to dislodge chads from the ballots themselves."); Appellants' Second Emergency Motion To Supplement The Record On Appeal In The United States Court Of Appeals For The Eleventh Circuit ("Supp. II Rec.") tab 37 at ¶ 3a(ii); Supp. II Rec. tab 39 at ¶ 3. In some instances, the ballots were even used as fans. Supp. II Rec. tab 44 at ¶ 3.3.

Unsurprisingly, this aggressive mishandling of ballots, especially after two or more machine counts of the ballots, dislodged large numbers of chads, which littered the floors of the recount rooms. E.g., Supp. II Rec. tab 25 at ¶¶ 5-6, 18; CA. Rec. 11 at 7. When observers attempted to memorialize the presence of dislodged chads, Democratic officials and county employees attempted to sweep away the chads rather than have the physical degradation documented. Supp. II Rec. tab 26 at ¶ 3; Supp. II Rec. tab 24 at ¶ 3. Thus, ballots that survive the repeated mechanical and manual recounts to which they have been subjected may not resemble the ballots Floridians actually cast on November 7, and the tabulations that result from this process cannot be said to be an ac-

curate, fair or consistent tabulation of the votes cast by Floridians in that election.

2. Irregularities In Counting Methods

The manual recount process is chaotic, changing and uncertain. Differing and sometimes self-contradictory guidelines were issued and then retracted. Other rules were not communicated to the ballot counters. The inevitable result was a complete lack of uniformity across the four counties and within the counties.

For example, a representative of the Palm Beach Board admitted that during the initial manual recount the board had applied inconsistent tests and procedures for determining which ballots to count and had changed its approach to that crucial issue midstream. C.A. Rec. 11 at 13 ["[t]he canvassing board ... just moments ago ... decided to not go with the light test, but to go with the test that's reflected on the procedures where, if one of the four corners of the chad is detached, ... then that will be a vote"); id. at 16 ("[T]hey were using the light test. Now if there is one corner, or three corners attached still, it won't be counted as a vote.").] According to another Palm Beach Board official, the standard for determining which ballots to count manually "is very vague in the law," and "[t]he canvassing board ... make[s] the rules.... They can do what they want as far as once they decide amongst themselves." Id. at 12, 19.

In Miami-Dade County, the supervisor of elections asked the canvassing board to define the criteria that would be employed in conducting the remaining partial manual recount. Appellants' Emergency Motion To Supplement The Record On Appeal In The United States Court Of Appeals For The Eleventh Circuit ("Supp. Rec.") 10 at 99, 101. In response, the chairman of the board stated that he could not know whether to count a ballot "until I reasonably see" it. Supp. Rec. 10 at 102. As he elaborated, "I don't think we should limit

ourselves in the parameters by which we consider.... I believe that we will know when we see, so to speak, what we are looking at" Supp. Rec. 10 at 102-03. The board thus declined to set any standards, Supp. Rec. 10 at 131, leaving the question of which ballots were to be counted to ad hoc, case-by-case discretion applied by officials acting with full knowledge of the election results elsewhere.

As Respondent Florida Democratic Party conceded in its Answer Brief in the Florida Supreme Court, "Different canvassing boards are using different standards." In fact, the Florida Democratic Party ("FDP") has sued to insure this divergence occurs. Supp. II Rec. tab 19.[3]

These widely varying policies (or lack of policies), and the confusing legal challenges to them, have translated into severe problems in the vote tabulating process itself. In Broward County, for example, the two-corner rule has apparently not been well-communicated to the counters (Supp. II Rec. tab 37 at ¶3a) – and is, in any event, under legal attack. Other internal counting rules, such as double-counting final stacks of ballots, have

[3] Respondent FDP filed a lawsuit against the Palm Beach County Canvassing Board over its initial decision to apply a uniform "detached chad" policy. The FDP preferred an open-ended "totality-of-the-circumstances" test. Supp. II Rec. tab 19 at ¶25. The Circuit Judge ruled on November 15 that Palm Beach County could not adopt a definite rule requiring that certain types of ballots be rejected, in effect mandating an ad hoc, standardless approach. Supp. II Rec. tab 12. FDP also sued to compel Broward County Canvassing Board to adopt a "totality-of-the-circumstances" rule rather than the more definite "two corner" rule, and also to compel the acceptance of so-called "dimpled" and "pregnant" chads. The Broward County Circuit Judge orally indicated that the two-corner-rule was too restrictive but has not issued a written ruling. Supp. II Rec. tab 17 at 8. While waiting for a ruling, Broward continues to use its two-corner rule. Id.

been announced, temporarily applied, and then rescinded. Supp. II Rec. tab 47 at ¶3. In general, confusion, disarray and mistakes are commonplace in the vote-counting process. Supp. II Rec. tabs 29, 33 & 46. The lack of intelligible, uniform standards fatally undermines any claim that manual recounting actually captures the intent of the voters.

3. Political Pressure

The atmosphere has become politically-charged with pressure being exerted on the county boards and their lawyers by prominent political figures such as former Secretary of State and current Gore campaign spokesperson Warren Christopher and Florida Attorney General Robert Butterworth. Supp. II Rec. tab 14. Indeed, observers also noted that the elections officers exhibited partisan bias and even hostility. C A. Rec. 11 at 57 (guidance to ballot counters expressed hostility to Republican attorney observers and implied that a Republican President would endanger the economy and increase the chances of war). Such external political pressure obviously increases the likelihood that conscious or unconscious bias will further taint the recount.

Other signs of politically driven decisionmaking proliferate. For example, the Broward County Canvassing Boards originally decided not to authorize a county-wide manual recount, but then reversed that decision in a 2-1 vote after extensive political lobbying. Supp. II Rec. tab 14 at 5. Media reports have widely recounted the erratic nature of the various canvassing boards and their decisions whether to proceed with manual recounts. See Supp. Rec. 6 (noting decision change by Miami-Dade county), 8 (noting decision change by Broward county), & 9 (same). The on-again, off-again process further illustrates the unchecked nature of the County Respondents' discretion, and demonstrates that the recounts do not provide a stable, fair, deliberate, and objective counting of ballots.

B. Proceedings In The District Court

On November 11, 2000, Petitioners filed this action in the United States District Court for the Southern District of Florida seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to enjoin the violation of their constitutional rights arising out of the selective, arbitrary, capricious, and discriminatory manual recounting of ballots and to protect the integrity of, and bring finality to, the November 7 Presidential election. Petitioners also filed a motion for a temporary restraining order or, in the alternative, a preliminary injunction to enjoin the members of the canvassing boards of Broward, Miami-Dade, Palm Beach, and Volusia Counties, Florida (the "County Respondents") from violating Petitioners' constitutional rights. After a hearing, the district court denied Petitioners' motion on November 13, 2000. App., infra, 1a-26a. Plaintiffs filed a notice of appeal the following day. Id. at 27a-28a.

C. Proceedings On Appeal

On November 15, 2000, Petitioners filed their opening brief on appeal, together with a motion for an injunction pending appeal and a motion to expedite the appeal. On that same day, the court of appeals voted to hear the case en banc. Thereafter, on Friday, November 17, 2000, the court of appeals denied the motion for injunction pending appeal without prejudice (App., infra, 31a), and granted Petitioners' motion to expedite the appeal. The court subsequently ruled that briefing would be completed by November 28, 2000, and oral argument, if any, would be held November 29, 2000.

Meanwhile, on November 21, 2000, the Supreme Court of Florida ruled that the County Respondents were entitled to continue their selective manual recounts and certify results based on those recounts, notwithstanding the expiration of the seven-day time limit imposed by Fla. Stat. §§ 102.111 and 102.112. Petitioner George W.

Bush is an intervenor in that state court action, and is filing contemporaneously herewith a petition for a writ of certiorari seeking review of that decision. Because these cases present closely related issues involving the results of the November 7 Presidential election, and in order that this Court might have both of these crucial cases before it sufficiently in advance of the meeting of the Electoral College in order to permit a meaningful decision on the merits, Petitioners determined to file this petition for a writ of certiorari before judgment. Petitioners have also filed a motion to expedite consideration of this petition in order to permit a decision on the merits in a timely manner.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because The Questions Presented Are Of Imperative Public Importance, And Review By This Court Is Essential To Bring Finality And Legitimacy To The Presidential Election

This case is extraordinary. It raises issues of imperative public importance seen only once in a generation. Indeed, not since United States v. Nixon, 418 U.S. 683 (1974), have questions of similar magnitude to those presented here been brought before this Court.

For two weeks, our Nation has waited to have confirmed the outcome of the November 7, 2000 election for President of the United States. Governor George W. Bush and Dick Cheney have garnered the most votes cast in Florida, as initially counted, as recounted, and as recounted again after receipt of overseas ballots. Nevertheless, the Secretary of State of Florida has been precluded from certifying these results or appointing electors in accordance with that popular vote, pending the completion of a selective, arbitrary, and standardless manual recount of ballots cast in only a handful of heavily Democratic counties in Florida.

This Court's direct and immediate review of the lower courts' refusal to halt the selective manual recount is warranted because this case "is of such imperative public importance" that the Court should deviate from normal appellate practice. Sup. Ct. R. 11. As discussed in greater detail below, this case presents important questions regarding the First and Fourteenth Amendments' protections for the fundamental right to vote. Moreover, these questions are presented in the context of one of the closest elections for President in our Nation's history.

There is a profound national interest in ensuring the fairness and finality of elections, particularly in an election for the highest office in the land. The constitutionality of the arbitrary recount process currently being implemented by the County Respondents in this crucial election presents precisely the type of question that the Nation justifiably expects should be decided by this Court. Indeed, absent a decision by this Court, the election results from Florida may lack finality and legitimacy. The consequences may well include the ascension of a President of questionable legitimacy, or a constitutional crisis.

II. Review Is Warranted Because The Lower Courts' Refusal To Halt The Arbitrary, Standardless And Selective Manual Recounts Conflicts With Decisions Of This And Other Courts

This case also warrants this Court's review because it presents important questions relating to the most fundamental of all constitutional rights– the right to vote. Specifically, this case challenges the use of arbitrary, standardless, and selective manual recounts as violative of the Equal Protection Clause, the Due Process Clause and the First Amendment.

A. The Manual Recount Constitutes a Violation of Equal Protection

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote" Reynolds v. Sims, 377 U.S. 533, 554 (1964). The right to vote is "denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds, 377 U.S. at 555. "The conception of political equality ... can mean only one thing— one person, one vote The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." Id. at 558 (internal citations omitted).

It is well established that the Equal Protection Clause prohibits government officials from implementing an electoral system that operates to give the votes of similarly situated voters different effect based on the happenstance of the county or district in which those voters live. See, e.g., Roman v. Sincock, 377 U.S. 695, 712 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653 (1964) (state apportionment scheme "cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside").

While these one-person, one-vote cases involve the intentional unequal weighting of votes, the requirement of equal treatment of voters in different geographical areas has been extended to situations in which a facially neutral voting scheme results, even innocently, in the disparate treatment of voters based on the counties in which they live. In O'Brien v. Skinner, 414 U.S. 524 (1974), for example, this Court held unconstitutional the New York absentee ballot statute because it made no provision for persons who were unable to vote while they were incarcerated in their county of residence. Under the New York statute, "if [a] citizen is confined in

the county of his legal residence he cannot vote by absentee ballot as can his cellmate whose residence is in the adjoining county." Id. at 529. As a result, the Court held, "New York's election statutes ... discriminate between categories of qualified voters in a way that ... is wholly arbitrary." Id. at 530. The Court therefore concluded that "the New York statutes deny appellants the equal protection of the laws guaranteed by the Fourteenth Amendment." Id. at 531.

As in O'Brien, Florida's selective manual recount provisions, as currently being applied, arbitrarily treat voters differently based solely on where they happen to reside in Florida. For example, where there is a partial punch or mark for one candidate on a ballot, that ballot may be counted in the four counties undertaking a manual recount, but not counted in any other Florida county. In fact, those ballots may be counted in some of those four counties, but not in others, because each county is free to invent its own standards. Or such standards may be changed from day to day or hour to hour even within a single Florida county. This intentional discrimination among voters on the basis of their county of residence, or even the precinct in which they reside, violates the fundamental principle of equal protection that voters cannot be subjected to disparate treatment "merely because of where they reside." Reynolds, 377 U.S. at 557; see id. at 566 ("Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.") (citation omitted).[4]

[4] A recent opinion letter of the Attorney General of the State of Florida seems to endorse this principle. In response to a request for an opinion by the Palm Beach Board on whether it should continue with its manual recount, the Attorney General reasoned:

[Footnote continued on next page]

B. The Manual Recount Violates Due Process

The facts here clearly present "'an officially-sponsored election procedure which, in its basic aspect, [is] flawed,'" *Duncan* v. *Poythress*, 657 F.2d 691, 703 (5th Cir. 1981) (quoting *Griffin*, 570 F.2d at 1077-78), cert. dismissed, 459 U.S. 1012 (1982), and which manifestly violates the Due Process Clause.

Florida's arbitrary manual recount is unconstitutional, *inter alia*, because it fails to set any meaningful standards for determining whether a manual recount should be initiated, which ballots should be manually counted, and what standards should be applied in determining whether a ballot should or should not be counted. As this Court has made clear, a State cannot deny an individual's liberty or property interest—including the right to vote—in an arbitrary and capricious manner. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). State election laws and practices having that effect constitute a denial of due process.

[Footnote continued from previous page]

> The circumstances surrounding these legal issues are extremely serious. If hand recounts have already occurred in [a] number of . . . counties . . . while similar hand counts are blocked in other counties . . ., a two tier system for reporting votes results.
>
> A two-tier system would have the effect of treating voters differently, depending upon what county they voted in. A voter in a county where a manual count was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.

Supp. Rec. 4 at 1 (Letter from Robert A. Butterworth, Attorney General of the State of Florida, to The Hon. Charles E. Burton, Chair, Palm Beach County Canvassing Board, Nov. 14, 2000).

In *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970), the Seventh Circuit invalidated an election board's imposition of ad hoc requirements for nominating petitions, agreeing with the plaintiffs' contention that "the Board's failure to issue guidelines clarifying the statutory standards for nominating petitions contravened due process." *Id.* at 1054, 1055. As the Seventh Circuit explained, "protection of the full measure of First and Fourteenth Amendment freedoms commands that state regulation of nominating procedures include a clear statement of the specific requirements by which nominating petitions will be tested." *Id.* at 1058.

The arbitrary, capricious, and standardless manual recount being used here suffers from the same fault as the nomination procedure invalidated in *Briscoe*. If the State of Florida wishes to implement a manual recount procedure, it must ensure that meaningful guidelines are established for determining whether and how to conduct such a recount, rather than leaving such crucial decisions to the unbridled discretion and arbitrary decision making of local election officials, who may have a keen personal interest in the outcome of an election and who administer the election system in counties selected by candidates or political parties who share those interests. The State's failure to provide such guidelines constitutes a clear violation of the Due Process Clause.[5]

[5] Before conducting a full manual recount under subsection 5, a county must first conduct a partial manual recount of "at least three precincts and at least 1 percent of the total votes cast." Fla. Stat. § 102.166(4)(d). With respect to that crucial threshold inquiry, the statute supplies no standards to guide the canvassing boards' discretion to open an initial partial manual recount. See Fla. Stat. § 102.166(4)(c). Hence, the critical determination to initiate the manual recount process at all is open to arbitrary decision making by county officials.

The manual recount scheme being implemented selectively in Florida is utterly lacking in meaningful standards. The statute by which the mandatory recount is being conducted prescribes no standards whatsoever to guide or constrain Florida's canvassing boards in determining when or how to count any particular ballot. When a statute's "purpose" is as open-ended as the correction of error, and the statute supplies no standards to guide the determination of "error," any such general statement of purpose provides no meaningful standard for its application by county officials. This is particularly the case when the statute authorizes persons, without any standards or constraints, to divine the "intent" of voters. In any event, the existence of statutory procedures for conducting recounts cannot substitute for the articulation of substantive standards to guide the canvassing board's implementation of the manual recount procedures.[6]

Indeed, the arbitrary and standardless nature of the process is confirmed by statements recently made by Mr. Nichols, the county spokesman for Palm Beach County. CA.Rec.11 (CNN Transcript: "Manual Vote Count Procedure Varies in Palm Beach County," Nov. 11, 2000). With reference to the question whether partially punched ballots should be counted if one could see

[6] For example, the procedural provisions of the manual recount statute address such matters as the composition of counting teams, the process for referring ballots to the canvassing board, and the procedures for verifying tabulation software. Fla. Stat. § 102.166(7)-(10). Such procedures, however, do not guide the canvassing board's discretion in determining whether or not to count a particular ballot. Although Section 102.166(7)(b) instructs the board "to determine the voter's intent," it gives no indication of how that subjective determination is to be made. The resulting discretion leaves an infinite space for arbitrary and unequal treatment of voters.

sunlight through the partial punch (the so-called "sunlight method"), Mr. Nichols explained that the standard is "very vague in the law." Id. at 12. As Palm Beach County Attorney Leon St. John further explained, the Palm Beach Board decided both to adopt and abandon the sunshine method in the midst of the recount itself. He noted that "[t]he canvassing board ... just moments ago ... had decided to not go with the light test, but to go with the test that's reflected on the procedures where, if one of the four corners of the chad is detached, ...then that will be a vote." Id.; see also id. (statement of Bob Nichols, Palm Beach County spokesman) ("[T]he policy would be that if you don't – they were using the light test. Now if there is one corner, or three corners attached still, it won't be counted as a vote."); id. at 18 (statement of Bob Nichols) ("There was a change in the middle."). Hence, given the circumstances of this case, the next President may be determined not by the votes counted and recounted by neutral, tested equipment made for the express purpose of tabulating and recounting ballots, but by an ephemeral, elusive, and infinitely elastic process that allows officials to change, and change again, without reference to established law, in the course of the process itself. And these officials are the very officials selected by the partisans in the election by virtue of the unlimited discretion by which counties for manual recounts are selected, and are acting with knowledge that their decisions may change the outcome of the Presidential election.

With humans making subjective determinations about an absent voter's intent, without standards established by law, there is always the risk that the method for determining how to count a vote will be influenced, consciously or unconsciously, by the officials' desire for a particular result. This risk of arbitrary and subjective decision making is especially acute in an extremely close election for the most important office in the nation. In effect, if the selective manual recount is allowed to proceed to the apparent end desired by its defenders, the

next President of the United States may be selected by the arbitrary and standardless decisions of a handful of potentially interested county officials about such matters as whether to count a vote because a ray of light shines through a hole or because only one, rather than two, corners of a chad remains attached to a ballot.

C. The Manual Recount Violates The First Amendment

Because the "right of qualified voters, regardless of their political persuasion, to cast their votes effectively" overlaps with "the right of individuals to associate for the advancement of political beliefs," voting is protected by the First Amendment. Williams v. Rhodes, 393 U.S. 23, 30 (1968). For the reasons discussed above, the selective manual recounts impinge upon and dilute First Amendment rights. Moreover, the manual recounts violate the First Amendment because, under Fla. Stat. § 102.166(4), the canvassing boards are vested with standardless discretion to initiate manual recounts. The Constitution prohibits state actors from exercising unconstrained discretion over the application of laws that implicate First Amendment rights. See City of Lakewood v. Plain Dealer Publ'g, 486 U.S. 750, 763 (1988) ("[The] danger [of a First Amendment violation] is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official."); Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (noting that the First Amendment "is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement," and that laws affecting First Amendment rights are invalid "if they are wholly lacking in terms of susceptible objective measurement") (internal quotation marks and citations omitted).

In addition, if Florida is permitted to count some votes differently from others – even in the mistaken be-

lief that the disparate treatment will increase accuracy – the government will effectively lift some voices above others. The First Amendment clearly forbids that result. See Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Response by Florida Secretary of State to Appeal

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *ET AL.*,

Respondents.

Response of Katherine Harris, Florida Secretary of State,
Katherine Harris, Laurence C. Roberts, and Bob Crawford,
as Members of the Florida Elections Canvassing Commission,
to Petition for Writ of Certiorari

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RESPONSE OF KATHERINE HARRIS, FLORIDA SECRETARY OF STATE, KATHERINE HARRIS, LAURENCE C. ROBERTS, AND BOB CRAWFORD, AS MEMBERS OF THE FLORIDA ELECTIONS CANVASSING COMMISSION, TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE AND FACTS AND PROCEDURAL HISTORY

The Secretary of state of Florida (the "Secretary") and the Florida Elections Canvassing Commission (the "Commission")[1] are respondents in this action since they were parties below. In presenting its response, the Secretary and the Commission are focused on Florida's election law as it stood prior to November 21, 2000 (the "Pre-Decision Period"), and how it now stands (the "Post-Decision Period"). November 21, 2000, is the date that the Supreme Court of Florida handed down the decision Petitioners urge this Court to review. *Palm Beach Canvassing Board v. Katherine Harris, et al.*, Case Nos. SC 00-2346, SC 00-2347, and SC 00-2348 (Fla. filed Nov. 21, 2000). Florida's Election Code is set forth at chapters 97 through 106, Florida Statutes.[2] The central

1. The Commission is composed of the Governor, the Secretary of State, and the Director of the Division of Elections. In this case, Florida's governor recused himself from the certification process and Florida's Commissioner of Agriculture, Bob Crawford, was appointed to fill the vacancy.

2. The Election Code is divided by chapter as follows: ch. 97 ("Qualifications and Registration of Electors"); ch. 98 ("Registration Office, officers, and Procedures"); ch. 99 ("Candidates, Campaign

focus of this case deals with Chapter 102, which is entitled "Conducting Elections and Ascertaining the Results."

The Secretary is an independently elected constitutional officer within Florida's scheme of an independently elected executive cabinet, composed of a secretary of state, attorney general, treasurer, comptroller and commissioners of Agriculture and Education. The Secretary is also the state's chief elections officer. *See* Fla. Const., art. IV, § 4(b); Fla. Stat. § 97.012. As such, the Secretary is charged with, among other duties, the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. § 97.012(1). The Secretary is also obligated, through the Division of Elections, to "provide advisory opinions when requested by any supervisor of elections . . . relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor . . . has taken or proposes to take." Fla. Stat. § 106.23(2). "The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion" *Id.*

After the polls close on an election day, two separate periods come into play: (1) the pre-certification protest period (the "Protest Period") (Fla. Stat. § 102.166); and (2) the post-certification contest period (the "Contest Period") (Fla. Stat. §

Expenses, and Contesting Elections"); ch. 100 ("General, Primary, Special, Bond, and Referendum Elections"); ch. 101 ("Voting Methods and Procedure"); ch. 102 ("Conducting Elections and Ascertaining the Results"); ch. 103 ("Presidential Electors; Political Parties; Executive Committees and Members"); ch. 104 ("Election Code: Violations; Penalties")' ch. 105 ("Nonpartisan Elections"); and ch. 106 ("Campaign Financing").

102.168). The Protest Period commences immediately upon conclusion of the election and concludes when the last county canvassing board certifies its returns. Once that occurs, the Commission certifies the election returns on two separate dates. The first date is seven days after the conclusion of the election, when each county canvassing board is required to report its final returns to the Division of Elections.[3] Three days later, on the tenth day after the elections have concluded, a supplemental filing is made by the county canvassing boards which adds the overseas absentee ballots that have been received by midnight on the tenth day. The combined returns are then certified by the Commission and become the final official returns. Once the combined returns have been received, the Commission certifies the election and declares the winners, after which the Contest Period commences.

Usually, there is no specific end to the Contest Period,[4] as there has been times in Florida when a contest resulted in the removal and substitution of an officer, already years into a term, at the conclusion of a Contest. The Contest Period for any presidential election must, however, be completed six days before the meeting of the state electors, which in this case is December 18, 2000. *See* 3 U.S.C. § 5 (1997). Thus, for the general elections of 2000, the Protest Period began at the time the polls closed at 8 p.m. on November 7 and ended at 5 p.m. on November 14, a period of seven days. The Contest Period was to commence at 5:01 p.m. on November 14, and was to end at midnight on December 12, 2000, or 29 days.

3. This year all county canvassing boards certified their returns by 5 p.m. on November 14, within the seven day statutory period prescribed by Fla Stat. § 102.11 (2000).

4. A contest must be initiated within 10 days when the last county canvassing board certifies its returns to the state. Fla. Stat. § 102.168(2).

As noted, after the conclusion of an election, any voter or candidate can file a Protest claiming that the election returns are erroneous (Fla Stat. § 102.166(1)). Procedures are set forth for the review of elections by paper ballots, voting machines, and "electronic or electromechanical equipment." There is a provision for manual recounts, but only the candidate or a political party can request such a review. Fla. Stat. § 102.166 (4)(a). The individual voter has no right to ask for a manual recount.[5]

County returns (with the exception of the overseas ballots) were due to the Department of State by 5 p.m. of the seventh day following the election or they would be ignored. *See id.*[6] Before final certification by the county canvassing board for any particular county, the candidates, their political parties or a political committee that supports or opposes an issue that appeared on the

5. Based upon the plain statutory language and legislative history, the Secretary and the Commission here maintained that manual recounts are only intended to be used when some type of machine or electromagnetic process is involved. App. at 1a.

6. In 1989, the Florida legislature amended the Election Code by adding section 101.112 (directed to county canvassing boards) which states, in pertinent part, the general rule set forth above regarding the seven-day deadline, but adds that "[i]f the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department." *See id.*, § 102.112(1). The amendment also provided a $200 a day fine to be levied against the canvassing board members personally for late returns. *See id.*, § 102.112(2). This was done at the same time as the amendments to section 102.166, Florida Statutes, in response to the machine voting problems that occurred in the Mackay-Mack U.S. Senate race in 1988. *See infra* at 11-12, n.10.

ballot were permitted to file a written request with the county canvassing board for a manual recount. *See id.*, §102.166(4)(a) & (b). If the county canvassing board authorizes the manual recount, the recount must include "at least three precincts and at least 1 percent of the total votes cast for such candidate or issue." *See id.*, § 102.166(4)(c) & (d). If the initial manual recount indicates "an error in the vote tabulation which could affect the outcome of the election," the board could: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the department of state to verify the vote tabulation software; or (c) manually recount all ballots.

On November 7, 2000, voters across the nation cast their ballots for, among other offices, President and Vice President of the United States. In Florida, the initial returns from all the counties showed statewide that Governor George W. Bush was slightly ahead of Vice President Albert Gore, Jr. Because the difference was less one-half of one percent, an automatic statewide recount was conducted by all counties the following day. *See id.*, § 102.141(4). After the recount, Governor Bush maintained a narrow lead over the Vice President. On November 9, the Florida Democratic Executive Committee requested manual recounts in the following counties: Volusia, Palm Beach, Broward and Miami-Dade.

On November 13, 2000, the Palm Beach Canvassing Board ("Palm Beach") requested, in writing, that the Division issue a written opinion as to whether the Department of State or the Commission had the discretion to extend the seven-day statutory filing deadline for election returns. By separate cover, Palm Beach also requested that the Division issue a written opinion as to when a county could authorize a manual recount of ballots.

Later that day, in response to a specific request from election officials, the Division issued two formal advisory opinions. *See* Fla. Stat. § 106.23. In response to the first request from Palm Beach, the Division issued Opinion DE 00-10 (App. at 1a) advising Palm Beach that election results not certified by 5 p.m. Tuesday, November 14 could not be counted in the certification of the statewide results. In response to the second request from Palm Beach, the Division issued Opinion DE 00-13 (App. at 2a) advising Palm Beach that the "error in tabulation" language in the statute that serves as the legal basis for a manual recount means "a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots." App. at 1a-2a.

Also on November 13, the Secretary notified all 67 county elections supervisors that the statutory deadline of 5 p.m. Tuesday, November 14 would not be extended. The Secretary further informed these parties that returns (other than overseas ballots) not filed by the deadline would not be included in the certification of statewide results.

The following day, in response to the requests from Palm Beach County officials, Florida's Attorney General, Bob Butterworth, issued a conflicting opinion, Opinion 00-65, advising Palm Beach that the "error in tabulation" means "a discrepancy between the number of votes determined by a voter tabulation system and the number of votes determined by a manual count of a sampling of

precincts pursuant to section 102.166(4), Florida Statutes." App. at 3a.

Volusia County had previously filed a lawsuit in Leon County, seeking to enjoin the Secretary and the Commission from certifying

election results without including returns filed after the seven-day statutory deadline. The Palm Beach County Canvassing Board, Vice President Gore and the Florida Democratic Party ("Democrats") intervened. After an initial hearing, Leon County Circuit Court Judge Terry P. Lewis directed the Secretary "to withhold determination as to whether or not to ignore late filed returns, if any, from Plaintiff Canvassing Boards, until due consideration of all relevant facts and circumstances consistent with the sound exercise of discretion." Bush App. at 50a.

The Secretary's first action in response to the order was to develop a set of evaluative criteria that would be used to decide whether to allow a late filing. First, a set of factors that could justify a late filing was developed. The existence of one or more of these factors, which were drawn from Florida elections case law, could have justified an allowance of late-filing. These factors (and their supporting case law) were:

- Whether there is any indication of voter fraud that could affect the outcome of the election. *In re: Protest of Election Returns*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

- Whether there was substantial noncompliance with statutory election procedures, causing reasonable doubt to exist as to whether the certified results express the will of the electorate. *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998)

- Whether election officials had made a good faith effort to comply with the statutory deadline, but were prevented from doing so by an act of god or similar circumstance beyond their control.

The Secretary next determined, again based on a review of the pertinent case law, that the following election irregularities would not constitute a sufficient reason for violating the statutory deadline:

- Noncompliance with statutory election procedures and/or voter error, where there is a reasonable expectation that the results express the will of the voters. *Beckstrom,* 707 So. 2d at 725.
- The use of a ballot design that was confusing to some voters because of the location and alignment of candidates names, so long as a reasonable voter could make his or her choice by exercising reasonable time and study. *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974).
- Any other situation that presented "nothing more than a mere possibility that the outcome of the election would have been [a]ffected." *Hogan*, 607 So. 2d 508, 510 (Fl. 4th DCA 1992).

As before, the Secretary's decision was based primarily on reported election cases, which found similar circumstances to be insufficient to justify interference with certified election results. The factors applied thus reflected the law of Florida existing before the Supreme Court of Florida's November 21 decision. App. at 16a.

Thereafter, in accordance with Judge Lewis' order, the Secretary distributed a memorandum to all of Florida's 67 counties

requesting that they provide a written statement, including the facts and circumstances that would justify any late filed returns by 2 p.m. Wednesday, November 15. App. at 8a.

On Wednesday, November 15, the canvassing boards for Palm Beach County, Broward County, Miami-Dade County, and Collier County, responded to the Secretary's memorandum, each providing the facts and circumstances that they believed would provide justifications for the Secretary waiving or extending the statutory deadline to permit later changes to their already filed returns. After carefully reviewing each request in light of pre-established criteria based on long-standing Florida law, the Secretary made a determination that none of the facts before her justified a waiver or extension of the deadline. The Secretary and the Division both consistently took the position that voter error was not a basis for initiating a manual count nor to extend the seven day statutory deadline to do so. Volusia County completed its manual hand count before the 5 p.m. deadline on November 14, and those results were included in Volusia County's timely return.[7]

The Commission certified the timely-filed November 14, 2000, election results for all but the overseas ballots. The certification reflects 2,910,492 votes for Governor George W. Bush and Secretary Dick Cheney and 2,910,192 for Vice President Albert Gore, Jr. and Senator Joe Lieberman.

On November 16, the Democrats filed an Emergency Motion to Compel Compliance with and for Enforcement of Injunction ("Emergency Motion"), and asserted that the Secretary

7. Neither the Secretary nor the Division are permitted to go beyond the local canvassing board's certification. *See* Fla. Stat. § 102.31.

acted arbitrarily and in contempt of Judge Lewis' order by refusing to accept the returns filed after the statutory deadline.

On November 17, Judge Lewis denied the Emergency Motion, ruling that the Secretary had not acted arbitrarily, and that she "exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision." Bush App. at 43a. Later that day, the Supreme Court of Florida *sua sponte* entered an order enjoining the Secretary and Commission from finally certifying the results of the November 7 election and declaring a winner in Florida until further order. Bush App. at 39a.

On November 21, 2000, the Supreme Court of Florida reversed Judge Lewis, holding that manual recounts were not limited to instances of machine error, and that the Secretary had abused her discretion in not accepting returns that were not filed within the seven-day deadline set by the legislature. In short, the Court enlarged the statutory Protest Period from seven days to 19 days, and shortened the Contest Period from 29 days to 16 days. The Court's holding changed the law in the state of Florida as it existed and was applied before November 7, 2000.

II.

THE FLORIDA ELECTION CODE PRIOR TO AND AFTER THE SUPREME COURT OF FLORIDA'S DECISION BELOW

Before the evening of November 21, 2000, when the Supreme Court of Florida issued the decision below, Florida's Election Code provided long-standing procedures requiring the reporting of results by specified deadlines, for dealing with errors in vote tabulation, conducting manual recounts in certain limited circumstances involving mechanical or software failure in mechanical voting equipment, certifying electronic results and allowing affected voters to contest the results of an election. In addition, there was a system that accorded much less time to the Protest Period than it did to the Contest Period.

Under the Election Code as it previously existed, any affected voter, political party or candidate could protest election returns before certification of the election results. Fla. Stat. § 102.166(1). In the event of such a protest, the local elections canvassing board had to follow specific procedures to verify the accuracy of the returns. The procedures to be followed varied depending on whether paper ballots designed for hand counting, voting machines, or machine tabulated paper ballots were used. Fla. Stat. § 102.166(3).

As part of section 102.166, only a candidate or political party is also permitted to file a written request with the local canvassing board for a manual recount. Fla. Stat. § 102.166(4)(a). Provided the request was timely, the canvassing board was given discretion as to whether to conduct a manual recount, after conducting a proper, statutorily-defined, test of certain precincts to determine if there was a mechanical or software problem. Fla. Stat. § 102.166(4)(c). The Protest Period had to be completed, and the election results certified to the Florida Secretary of State within seven days of the election. Fla. Stat. § 102.111(1). Immediately

upon such certification, the Commission was required to certify the elections results.[8] *Id.*

The conclusion of this seven-day protest and certification process triggered the right of any affected voter, taxpayer, as well as an unsuccessful candidate or party, to file an elections contest. Fla. Stat. § 102.168(1). Unlike the pre-certification protest procedure, the Contest Period allows for a full evidentiary record to be introduced, and all facts and circumstances surrounding the election to be examined in the courts. Fla. Stat. § 102.168. Further, an election contest allows for a single venue in the circuit court serving the state capitol for lawsuits stemming from a statewide election, Fla. Stat. § 102.1685, and grants broad authority to the court to fashion appropriate relief. *See id.*, at 102.168(8). The Florida Legislature imposed no specific time limitations on a judicial elections contest, but imposed strict time limits on Protests and recounts that precede a certification, which is the prerequisite to a Contest.[9]

8. Florida law contemplated that the winner of the election would be declared on the seventh day following the election. Fla. Stat. § 102.111. For federal offices, however, a winner cannot be declared until three days later. That is, however, not a matter of state law. A consent decree between the state of Florida and the United States requires Florida to count absentee ballots from citizens living outside the United States that are received up to 10 days following the election. The consent decree was entered into following the enactment of the seven-day certification provisions in the Florida Election Code.

9. The Florida Legislature's intent to have the protest completed within seven days is exemplified by the fact that it imposed strict financial penalties on local canvassing board members who failed to submit timely returns and required the Commission to ignore any counties that fail to file returns within seven days and certify the election results based solely on

In response to a Protest, Florida law, as it existed prior to November 21, allowed manual recounting to be conducted only in certain limited circumstances. Fla. Stat. § 102.166(5). Both the plain language and legislative history of Florida's election statutes indicate that a manual recount of the ballots in a county was proper only where there has been a failure of the vote tabulation system or as required by a circuit court exercising jurisdiction in a properly filed elections contest action.[10] Failure

those returns that are timely filed. Fla. Stat. § 102.112(1)

10. The provisions of section 102.166, Florida Statutes, at issue were enacted by the Florida Legislature in 1989 in response to concerns about computer failure in elections and the use of unreliable software to tabulate votes. Ch. 89-348, § 15 Laws of Florida. These concerns had been raised in the 1988 race for the United States Senate between Buddy MacKay and Connie Mack and in subsequent news articles. The legislature enacted sections 102.166(4)-(10), Florida Statutes, to address these concerns as part of what was called the "Voter Protection Act." The Senate Staff Analysis and Economic Impact statement for the Voter Protection Act noted:

> An incident of mechanical problems with an electronic voting system occurred in Bradenton, Florida where a seventh of the county's precincts had to be counted twice in one election since the ballots were soggy, became warped and were mangled by the voting equipment. Also, an apparent software "glitch" or error was responsible for an incident in Ft. Pierce when a machine would count the Democratic votes, but would not accept Republican ones.
>
> Other horror stories related to electronic voting systems have been reported on in the media, but in testimony

of certain voters to properly execute their ballots was not a basis for conducting a manual recount, although this issue could be raised in a post-certification elections contest.[11] App. at 1a-2a.

> before the Joint Committee on Information Technology Resources in 1989, supervisors of elections pointed out that there can be problems with any kind of voting system. However, many local election officials would agree that state certification procedures and local logic - and - accuracy tests provide a reasonable assurance that "electronic" elections are honestly counted. It is generally agreed that additional steps could be taken in Florida to improve security procedures, while not hampering the already cumbersome elections process, would enhance public confidence in our voting system.

App. at 10a (emphasis added).

As this legislative history indicates, the statute was intended to provide an alternate recounting procedure to be used in situations in which mechanical or computer problems caused tabulation equipment to fail to function as intended. The legislature never intended for manual recounts to be used to evaluate ambiguous ballots that *voters* failed to properly execute. Consistent with the legislative intent the Division of Elections formal advisory opinion left open the possibility of a full manual recount, but precluded a recount to assign votes to candidates based on improperly executed ballots that cannot be read by properly operating tabulation equipment.

11. The Division Opinion is an administrative interpretation of the statutes within its subject matter jurisdiction and is binding on subordinate agencies such as the Board. This opinion "remains binding until properly amended or revoked by the Division itself, or invalidated by a court having jurisdiction of the matter." *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994); *see also Krivanek v. Take Back Tampa*

Florida has never recognized a common-law right to protest election results, much less to require manual recounting of machine ballots. Prior to November 21, the right to a manual recount existed only to the extent provided by the Legislature. Florida Statutes section 102.166(5) allowed such a recount *only* when there had been an "error in vote tabulation." This term had consistently been interpreted, prior to November 21, to mean a failure of the tabulation equipment to count properly executed ballots.[12] App. at

Political Committee, 625 So. 2d 840, 844 (Fla. 1993). In contrast, the Board was *not* bound to adhere to the Attorney General's opinion. In fact, it was questionable whether the Attorney General even had the authority to issue an opinion on an election issue, given the specific allocation of this function to the Division of Elections in section 106.23(2).

12. In the weeks before the November 7, 2000, general election, each registered voter in Florida was provided with a sample ballot and detailed instructions on how to vote according to the method used in his or her precinct. Additionally, a copy of the instructions was placed prominently in each voting booth. *See* Fla. Stat. § 101.46. In those districts using punch cards, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. App. at 14a. The instructions included this specific direction:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

Id. When voters followed the instructions, including the removal of any loose chips left attached to their ballots, the automatic tabulation accurately tabulated the ballots. There is no contention otherwise. Only

1a-2a. Thus, when voters failed to mark ballots correctly, there had been no failure in their tabulation under Florida law, and no manual recount was authorized. *Id.*

The Florida Supreme Court's November 21 decision has made a number of changes in Florida's election laws, setting aside some provisions, and implementing others. It has also recognized equitable principals that take precedence over statutory provisions and the exercise of discretion by the Secretary.

First, the requirement that tabulation of election results be completed within seven days has been eliminated. In its place there is a new, judicially-created time limitation that allows at least 19 days to complete the Protest Period before certification, and possibly more when an election protest and request for manual recount have been filed. Bush App. at 38a. Local canvassing board members are now under no duty to comply with the strict time limitations that previously existed and can no longer be fined or have their returns ignored for failing to file certified returns. *Id.*

Second, local canvassing boards may now file amended returns after the statutory deadline, even if they had properly filed returns before the deadline. *Id.* The Secretary of State now has no discretion to reject any such amendment, unless it is so late that it will preclude a candidate or voter from contesting the election or jeopardize the ability of the state to appoint presidential electors within the time limitations of federal law. Bush App. at 37a. Before the November 21 decision, there was no provision in Florida

the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices, as directed, would be affected by the manual recount at issue.

statutory law that allowed returns to be amended, much less amended after the statutory time limitation for final certification and declaration of the winner has passed. There was also no statutory provision that required the Secretary of State to accept late-filed returns, or limited late filing specifically to situations where the federal time limitations jeopardize Florida's electoral votes. Indeed the existing Florida law required just the opposite: "If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on the file shall be certified."[13] Fla. Stat. § 102.111(1). Late returns, if they would affect the outcome of the election, could be added only if ordered by a circuit court in an election contest action. Fla. Stat. § 102.168(3)(e) and (8). Before November 21, this statute was consistently interpreted to require submittal of returns within seven days. *See Chappel v. Martinez*, 536 So. 2d 1007, 1009 (Fla. 1984)

13. This statute governs the Elections Canvassing Commission and sets forth its duties with respect to acceptance of election returns and certification of election results. A related provision, which governs local canvassing boards, states that "[r]eturns must be filed by 5 p.m. on the 7th day following the . . . general election," and puts those boards on notice that "[i]f the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department." Fla. Stat. § 102.112(1). While this provision may grant the Secretary of State some discretion in deciding whether to accept late returns. The construction by the Supreme Court of Florida to absolutely require late returns to be accepted or to authorize the post-deadline amendment of returns already filed is clearly a change in what might otherwise be understood from reading the provision, even in connection with section
102.112, Florida Statutes.

(requiring substantial compliance with the deadline and holding that telephone transmittal before the deadline sufficed).

Third, the Florida Elections Canvassing Commission is now precluded from certifying election results on the seventh day following the election, as previously required under Florida Statutes sections 102.111, 102.121 and 102.131. Indeed, even where certified returns were filed by all counties within the time limitations that existed before the November 21 decision, the Commission must now wait at least until November 26 to certify the results of the election.

Fourth, the time frame for an elections contest, the only procedure available to individual voters to challenge the outcome of the election, is now drastically shorter. Under the prior law, the period for filing a contest would have begun with the final certification of results on November 17, and the contest proceeding could have extend until December 12, the federal deadline for appointment of presidential electors. Now, any contest cannot begin until the recounts are completed and the results certified. At the earliest, this will not occur until November 26, cutting the contest period from 25 days – already an extremely short period in which to develop a case conduct discovery, have a trial, and pursue any subsequent appeals – to a mere 15 days.

Finally, but perhaps most importantly, manual recounting may now be used in a significantly broader way than previously available. Prior to November 21, in the absence of a judicial decree rendered in an election contest action, manual recounting was allowed only in the case of mechanical, software or other similar failure in the automated vote tabulation and were considered dehors the common law. The Supreme Court of Florida has now recognized

that these rights are equitably required and grounded in Florida constitutional law.

Under Florida Statutes section 102.166(5) a manual recount was a last-resort remedy to be used in areas with automated tabulation systems only when there was no way to mechanically tabulate the ballots. When a sample manual recount indicated a problem with the vote tabulation system, the local canvassing board first attempted to correct the error and recount the remaining precincts with the system under subsection (5)(a). If the error could not be corrected, a board was allowed request the Department of State to verify the tabulation system under subsection (5)(b). Finally, if the system could not be corrected or verified to work properly, then as a last resort, the board would have manually recounted the ballots under subsection (5)(c). There was never any indication that Florida Statutes section 102.166(5) allowed voter errors caused by improperly marked or punched ballots to be selectively corrected. The statute was enacted to provide a remedy when a vote tabulation system failed to read properly marked ballots, not to provide local canvassing boards the unbridled discretion to choose the method of tabulating votes on an *ad hoc* basis after an election was completed.

As a result of the Supreme Court of Florida's decision, the Secretary, the Commission and Florida's 67 local elections canvassing boards will now treat the election certification process quite differently than they would have previously:

- Where the Secretary would have previously rejected late filed election returns, she is now required to accept those returns, so long as the late filing does not violate the judicially created test of being "so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's

voters from participating fully in the federal electoral process."

- Where the Elections Canvassing Commission would have certified the statewide election on November 17 on the certified returns filed by all of Florida's 67 counties, the Commission must now wait on the results of manual recounts conducted in selected areas, delaying final certification until at least November 26 that must include amendments to the November 14 filing other than overseas ballots.
- Where local canvassing boards were previously precluded from conducting manual recounts in the absence of an error in the vote tabulation system, they now will conduct recounts in almost any circumstance;
- Where each local canvassing board would have submitted only one final set of returns, the local canvassing boards may now conduct a series of recounts and amend their prior certification for some time after the deadline to certify has passed; and
- Where a uniform system of automated counting was previously in place, Florida's votes, including votes for the electoral college, will now be decided based on standards developed by individual local canvassing boards in selected areas of the state.

Dated this 24th day of November, 2000.

Respectfully submitted,

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November 24, 2000
Court Order Granting December 1, 2000 Hearing to Review Florida Supreme Court Ruling and Denying Review of 11th Circuit Ruling

(ORDER LIST: 531 U.S.)

FRIDAY, NOVEMBER 24, 2000

CERTIORARI GRANTED

00-836 BUSH, GEORGE W. V. PALM BEACH COUNTY CANVASSING BOARD, ET AL.

The motion of petitioner for leave to file a petition for a writ of certiorari on 8 ½ by 11 inch page proofs is granted. The motion of respondents for leave to file the brief in opposition on 8 ½ by 11 inch page proofs is granted. The motion of petitioner to expedite consideration of the petition for a writ of certiorari is granted. The petition for a writ of certiorari is granted on Questions 1 and 2 as presented by the petition. In addition, the parties are directed to brief and argue the following question: What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. Sec. 5? The briefs of the parties, not to exceed 50 pages, are to be filed with the Clerk and served upon opposing counsel on or before 4 p.m., Tuesday, November 28, 2000. Reply briefs, if any, not to exceed 20 pages, are to be filed with the Clerk and served upon the parties on or before 4 p.m., Thursday, November 30, 2000. The parties are encouraged to agree on the contents of a joint appendix. Rule 29.2 is suspended in this case. Briefs may be filed in compliance with Rule 33.2 to be replaced as soon as possible with briefs prepared in compliance with Rule 33.1. The case is set for oral argument on Friday, December 1, 2000, at 10 a.m. and a total of one and one-half hours is allotted for oral argument.

CERTIORARI DENIED

00-837 SIEGEL, NED, ET AL. V. LePORE, THERESA, ET AL.

The motion of petitioners for leave to file a petition for a writ of certiorari before judgment on 8 ½ by 11 inch page proofs is granted. The motion of respondents for leave to file the brief in opposition on 8 ½ by 11 inch page proofs is granted. The motion of petitioners to expedite consideration of the petition for a writ of certiorari before judgment is granted. The petition for a writ of certiorari before judgment is denied without prejudice.

November 28, 2000
George W. Bush Brief for December 1, 2000 United States Supreme Court Hearing to Review Florida Supreme Court Ruling

No. 00-836

IN THE
Supreme Court of the
United States

GEORGE W. BUSH

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *ET. AL.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF THE FLORIDA SENATE AND HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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November 27, 2000

QUESTIONS PRESENTED

1.Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. §5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State in such Manner as the Legislature thereof may direct.

3. What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. Sec. 5?

INTEREST OF THE *AMICI CURIAE* [1]

The Constitution and laws of the United States assign preeminent responsibilities to the State Legislatures in the process of appointing Presidential Electors. As we explain in this brief, the disposition of this case, especially in light of the additional question raised by the Court, will almost certainly have a substantial impact on how the Florida Legislature[2] will carry out those responsibilities in the present most unusual circumstances. Indeed, the Florida Legislature's interest is so great that it would have sought to intervene in the litigation below but for the circumstances that, until 14 days after the election, or November 21, 2000, the Florida Legislature was not lawfully organized and the constitutional offices of Speaker of the House, President of the Senate, and Clerk of the respective chambers were thus vacant. FLA. CONSTITUTION ART. III, §2, §3a.

SUMMARY OF ARGUMENT

The Constitution grants plenary authority to the State Legislatures to appoint their Presidential Electors in any manner they direct. 3 U.S.C. §5 provides that, if a State's electoral process is timely and conforms to pre-existing rules, Congress will regard the results of that process as conclusive of which Electors were appointed in the manner directed by the State Legislature. When the electoral process has failed to make a choice that is timely and conforms to pre-existing rules, then under 3 U.S.C. §2 the State Legislature must appoint Electors to assure that the State's Electors are counted by Congress when exercising its counting authority. The Legislature itself, and not

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The Florida Legislature has secured the consent of all parties to the filing of a brief as *amicus curiae* and those consents are being lodged with the Clerk of the Court.

[2] We will use the term "Florida Legislature" to refer to both the Florida Senate and the Florida House of Representatives.

the courts, is the arbiter of when a failure to make such a choice has occurred.

In view of the constitutional and statutory schema, this Court should rule that the question whether the state electoral process deviated from pre-existing law under 3 U.S.C. §5 is not justiciable but is instead a political matter to be decided in the first instance by the State Legislature under U.S. CONST. ART. II, §1, ¶2 and 3 U.S.C. §2, then by Congress when exercising its counting authority under U.S. CONST. Amend. XII and 3 U.S.C. §15.

If the Court finds that the issue is justiciable, it should rule that whether the state electoral process has conformed to pre-existing rules is a federal question under U.S. CONST. ART. II, §1, ¶2 and 3 U.S.C. §5, to be resolved ultimately by this Court and not by the highest state court.

If the Court also concludes that the electoral process at issue deviated from pre-existing law, and therefore did not comply with 3 U.S.C. §5, then it should order the Florida courts to correct those deviations before December 12 in order to assure that Florida's Presidential Electors will be determined by the choice of the voters under those pre-existing rules. If those deviations cannot be corrected by December 12, then it will be necessary for the Florida Legislature to exercise its authority to appoint Electors to assure Florida is represented in the Electoral College.

ARGUMENT

1. The State Legislature Has Plenary Authority To Appoint Electors And, When An Election Fails To Make A Timely Choice Pursuant To Pre-existing Rules, It Must Exercise That Authority To Assure Its Electors Are Counted By Congress.

The Constitution of the United States grants each State Legislature the plenary power to appoint that State's Presidential Electors. See U.S. CONST. ART. II, §1, ¶2 ("each State shall

appoint, in such manner as the Legislature thereof may direct, a number of Electors."). This clause confers "plenary power to the state legislatures in the matter of the appointment of electors." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). "'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states.'" *Id.* at 34 (quoting favorably Senate Rep. No. 395, 1st Sess. 43d Cong. (1874)).

The Constitution places upon Congress the duty to count the votes of the Electors whom the states have appointed. U.S. CONST. Amend. XII. Implicit in this duty is the authority to resolve disputes about whether the Electors have in fact been appointed in the manner directed by the State Legislature. Congress has enacted statutes to regulate its counting of electoral votes. These statutes have been codified in Title III of the United States Code.

Where, as in Florida, the Legislature has chosen to use an election to determine which Electors to appoint, 3 U.S.C. §5 provides that the results of that election shall be deemed conclusive by Congress when it counts electoral votes, provided controversies regarding that election are resolved in a manner that is both timely (here before December 12, 2000) and in conformance with rules and procedures adopted prior to the election. Timeliness is crucial because of, among other things, the importance of having a President and allowing preparations for an orderly transition. Even more crucial is the principle embodied in Section 5 that the rules of the election must be set before the election and cannot be changed after it becomes clear who would benefit from such a change. Otherwise the law would encourage post-election manipulations of election law to alter the outcome of a Presidential race.

If a State's election "has failed to make a choice" that is timely and conforms with pre-existing law, then 3 U.S.C. §2 recognizes that appointment of Electors by the State Legislature is proper. In such a case, state legislative appointment would be necessary to assure the State will have Presidential Electors that will be counted by Congress under Title III. Indeed, the Florida

Legislature would have an affirmative constitutional duty to appoint Presidential Electors before December 18 to assure Florida is represented in the Electoral College, because the Constitution dictates that each State "shall" appoint the requisite number of Presidential Electors "in such Manner as the Legislature thereof may direct." U.S. CONST. ART. II, §1, ¶2. Where purported Electors have been chosen by an election process that was not conducted in the manner that the State Legislature had directed, then it becomes necessary for the State Legislature to exercise that appointment authority directly.

2. The Question Whether A State Election Of Presidential Electors Has Failed To Make A Timely Choice That Conforms To Pre-existing Rules Is A Matter To Be Decided By The Political Branches Rather Than By The Courts.

Although no single provision explicitly addresses which entity is responsible for deciding whether an election failed to make a choice that is timely and in conformance with pre-existing law under 3 U.S.C. §5, a careful reading of the Constitution and the United States Code dictates the answer: the responsibility falls first to the State Legislature and, if it has not exercised that prerogative, then to Congress.

Article II, Section 1, of the United States Constitution expressly grants each State Legislature the authority to assure that its Electors are chosen in the manner it has directed. This constitutional power is conferred directly on the State Legislature, not on the State as a whole, and cannot be limited by state courts or even by a state constitution:

> "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. . . . This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the

> legislature to resume the power at any time, for it can neither be taken away nor abdicated."

McPherson, 146 U.S. at 34-35 (favorably quoting 1874 Senate Report, *supra*).

Because of the constitutional nature of a State Legislature's appointment authority, Title III of the United States Code cannot be understood as a limitation on the State Legislature's authority to appoint Presidential Electors. *See* 18 CONG. REC. 47 (1886) (statement of Rep. Dibble). Congress has no power to limit the exercise of a constitutional power granted directly to the State Legislatures. As Charles Pinckney stated:

> Nothing was more clear . . . than that Congress had no right to meddle with [the electoral college] at all; as the whole was entrusted to the State Legislatures, they must make provisions for all questions arising on the occasion.

KURLAND & LERNER, FOUNDER'S CONSTITUTION 553. Instead, Title III merely regulates how Congress will exercise its own constitutional authority to count the electoral votes it receives.

Indeed, even if it were constitutionally permissible for Congress to limit the appointment authority of State Legislatures, there is no reason to think Title III was ever intended to do so. Sections 2 and 5 of Title III were enacted as part of the Electoral Count Act of 1887, Ch. 90, 24 Stat.373, the very title of which emphasizes that it merely regulates Congress's own authority to "count" electoral votes in cases where it is disputed whether the Electors were appointed in the manner directed by the State Legislature. Likewise, it is plain this Court did not understand Sections 2 and 5 to have limited the appointment power of State Legislatures, since the *McPherson* opinion in 1892 re-emphasized the plenary nature of that appointment authority five years after the Electoral Count Act was enacted. Being enacted in a period between this 1892 opinion and the 1874 Senate Report quoted above, the Electoral Count Act of 1887 surely reflected the contemporaneous constitutional understanding that State Legislatures had

exclusive authority over their appointment power, and did not mean to abrogate it.

Where a State Legislature has directly appointed its Electors because there was no election or it was determined that (for reasons of timeliness or deviation from pre-existing rules) the election failed to make a choice, there can be no legitimate dispute in Congress whether the directly appointed Electors were appointed in the manner directed by the State Legislature and thus should be counted. The direct appointment removes any ambiguity about the exercise of the State Legislature's appointment authority. Thus, 3 U.S.C. §2 provides that Congress will recognize those direct appointments when Congress exercises its own counting power. Congress has a constitutional obligation to count the votes of any qualified Elector who was indisputably appointed by the State Legislature.

Section 5 of Title III is meant to address the more complicated case where the State Legislature has not directly appointed its Electors but has instead directed that those Electors be chosen in an election conducted according to certain rules. Where the election process is conducted according to those pre-existing rules, then under Section 5 its results are conclusive on Congress when it counts the electoral votes. But Title III recognizes that controversies might arise about whether an election was in fact conducted according to pre-existing rules, raising questions about the validity of one or more slates of Electors. This would create an ambiguity about whether (or which of) the purported Electors were constitutionally appointed in a manner directed by the State Legislature. To resolve such controversies, Section 15 of Title III provides that it will then be up to Congress to determine whether the votes of the Electors before them have been "regularly given" in compliance with the timeliness and pre-existing rules provisions of 3 U.S.C. §5. *See* 18 CONG. REC. 30 (1886) (statement of Rep. Caldwell); *id.* at 47 (statement of Rep. Cooper). Section 15 goes on to set out elaborate rules for how the House and Senate will resolve objections that the votes of particular Electors were not "regularly given." In essence, such objections are resolved by the concurrent agreement of the House and Senate, and where

they disagree the Electors who will be counted are those who were certified to Congress as the correct Electors by the State Governor. 3 U.S.C. §15. These elaborate rules would not have been necessary if Congress had envisioned the courts would decide the issue of which Electors' votes were "regularly given."

The Florida Legislature respectfully submits that the Court should rule that questions regarding whether the electoral process has conformed with pre-existing law are not issues for this Court. Such questions should be determined by the State Legislature or, if it fails to act by December 18 when the Electors cast their votes, by Congress when it counts those electoral votes on January 6, 2000. Such a ruling that these are non-justiciable questions to be resolved by the political branches would recognize that the Constitution vests the State Legislatures with the power to appoint Electors, and Congress with the power to count their votes. It also makes the most sense of the United States Code governing how Congress exercises its counting powers. The alternative would put this Court in the uncomfortable position of seeking to enjoin how Congress exercises its constitutional counting authority and how the State Legislatures exercise their constitutional appointment authority.

The situation is analogous to that under Article V, which requires that amendments to the Constitution be ratified either by conventions or by three-fourths of the State Legislatures. This requires determinations of the equally political (but even more fundamental) question whether each State Legislature has duly ratified, pursuant to Article 5, a proposed amendment to the Constitution. Even without any express constitutional provision empowering Congress to count ratifications by State Legislatures, this Court has ruled that "the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." *Coleman v. Miller*, 307 U.S. 433, 450 (1939). Indeed, four concurring Justices stated that "Congress has sole and complete control over the amending process, subject to no

judicial review." *Id.* at 459 (Black, J., joined by Roberts, Frankfurter & Douglas, JJ., concurring).

A ruling of non-justiciability would avoid involving this Court in a political dispute best resolved by the political process.[3] It is neither surprising nor inappropriate that the law should lodge that authority in the State Legislatures and Congress. What is at stake here is after all a political determination of who shall be the next President. The issue to be determined is uniquely political. Nor is it likely to recur. Thus, in this rare circumstance, it is entirely appropriate to have it resolved by the branches of government that are most responsive to the will of the people. "The constitution . . . recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object." *McPherson,* 146 U.S. at 27. In any event, whether desirable or not, that is the constitutional scheme. *Id.* at 35 ("The question before us is not one of policy, but of power.")

In short, the Florida Legislature submits that the issue of whether its state electoral process has complied with pre-existing law and the directions of the State Legislature is a non-justiciable issue best resolved by the State Legislature responsible for giving those directions. It may be that Congress in exercising its counting authority under U.S. CONST. Amend. XII or 3 U.S.C. §15 may make its own determination of this question. In either event, such determinations should not be reviewable in any court. If this Court rejects that contention,

[3] That the questions the parties ask this Court to answer are political in nature is a conclusion that accords with several of the criteria set out in *Baker v. Carr*, 369 U.S. 186, 271 (1962). There is indeed a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* Moreover, a decision that would in effect decide the outcome of a Presidential election is "of a kind clearly for nonjudicial discretion." *Id.* Also the Court's intervention may be taken to imply "lack of respect due coordinate branches of government." *Id.* And finally there is indeed the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

then it must determine for itself whether the state electoral process has complied with the provisions of 3 U.S.C. §5 and the State Legislature's directions under U.S. CONST. ART. II, §1, ¶2. But, as demonstrated in the next section, the one entity that cannot be allowed to have sole unreviewable authority on this issue is the Supreme Court of Florida.

3. If This Is A Matter Justiciable By The Courts, It Is A Matter of Federal Law To Be Determined Ultimately By This Court.

If this Court rules that the issue is justiciable, then the Supreme Court of Florida cannot have the last word on what is, after all, a question of federal law. 3 U.S.C. §5 provides an express federal statutory requirement to have elections for Presidential Electors determined by pre-existing state election law. The question whether that federal requirement has been violated by a change in state law, if justiciable at all, is justiciable as a federal question. Likewise, U.S. CONST. ART. II, §1, ¶2 requires that Electors be appointed in conformance with the directions of the State Legislature. The issue of whether that constitutional requirement has been met, if justiciable, clearly presents a question of federal constitutional law.

Section 5 of Title III lays down a federal standard for judging whether there has been such a failure to choose Electors: the appointment of Electors set out in state law "shall be conclusive, and shall govern in the counting of the electoral votes" but only if the State has "provided, by laws enacted *prior* to the day fixed for the appointment of electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors . . . by judicial or *other* methods or procedures" 3 U.S.C. §5 (emphasis added).

Florida has in place an election code for the resolution of disputes and a court system, including a supreme court, with the usual judicial powers of such courts. This does not mean, however, that therefore whatever conclusion emanates from the Supreme Court of Florida must be taken as correct and final by this Court, the Florida Legislature and the Congress. Such a

reading of Section 5 would fail to offer assurance, which it is surely the intent of the Section to provide, *see* 18 CONG. REC. 47 (1886) (statement of Rep. Cooper), that the rules and directions of the State Legislature have not been altered after the election to suit a particular outcome. Even if the section grants only procedural justice, what is in question here is precisely a change of election procedure. Pre-existing law did not provide that the election procedure would be whatever the Supreme Court of Florida decided it would be after the election. Rather, the pre-existing law provided that detailed statutory procedures were to be followed and that some issues were to be resolved by the Secretary of State (one of the "other methods or procedures" recognized under §5) rather than the courts. The Florida courts cannot be the final arbiter of whether they themselves have changed the methods and procedures directed by the Florida Legislature. *See,e.g., Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (review in the United States Supreme Court will lie to determine whether a state court has misinterpreted state law to defeat a federal right).

Federal constitutional law is replete with instances in which a matter rests upon a determination of state law provided that the final state interpretation or application of that law does not depart from previously established state law. The rules of property law, for example, are exclusively the creation of state law, but in enforcing the Fifth Amendment's proscription against taking property without just compensation, the federal courts review whether state law changed from what had previously been state law. *See Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1029 (1992) (property limitations that are "newly . . . decreed" by state courts can be takings if they do not reflect "restrictions that background principles of the State's law of property and nuisance *already place* upon land ownership" (emphasis added)); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (whether interest is the property of the owner of the principal depends on what the state law was prior to the regulation). Such an inquiry into the pre-existing condition of state law is also carried out to determine whether there has been a deprivation of "life, liberty or property, without due process of law." U.S. CONST. Amend.

XIV, §1. *See, e.g.*, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Similarly, the Constitution's *ex post facto* clause, U.S. CONST, Art. I, §10, would be deprived of meaning if inquiry into whether a State has changed its previous law were foreclosed.

In sum, where federal law requires that a rule of law, including a rule of state law, be previously established or enacted, as does 3 U.S.C. §5, it is a federal question whether the development of law by the courts, including state courts, constitutes an impermissible departure from such previous law. In this case, it appears that there may have been at least three sorts of departures from pre-existing law such as may deprive the choice of Electors of the conclusivity otherwise accorded to the state electoral process by Section 5.

First, the Supreme Court of Florida, by extending the mandatory statutory seven-day deadline for reporting county results to the statewide commission, delayed certification of the vote count after the election, and significantly shortened the time in which contests regarding the vote as certified might be brought and adjudicated. By compressing that time, the court increased the likelihood that such contests would not be finally adjudicated by the date that a final choice of Electors by an election must be made (here, December 12, 2000) and therefore that the Legislature, under Section 2, would have the power and duty to appoint Electors. That compression and the seriousness of its consequences may constitute an important obstacle and deterrent to the full and fair adjudication of such contests. It also appears dramatically to change the existing law by which the Florida Legislature sought to appoint Electors.

Second, the court below shifted responsibility to make any decisions about deadline waivers and interpretations of the election code to itself and away from the statute and the elected official, the Secretary of State, whom the Florida Legislature vested with the authority to make such decisions. The Supreme Court of Florida in essence re-wrote a statutory provision stating that voting returns "shall" be filed in time to say they "may" be filed in time, re-wrote a provision stating that the Secretary

"may" count late returns to provide instead that she "must," re-wrote a seven-day reporting deadline provided by the legislature to a nineteen-day deadline, and re-wrote a statute that said the Secretary of State's opinions "shall be" binding on county officials to say they shall not.[4] These post-election interpretations of the election laws do not appear to conform to pre-existing law.

Third, it appears that several of the county canvassing boards may have failed to adhere to the rules and standards for whether and how to do manual recounts that they had adopted in previous elections, i.e. rules and standards in force "prior to [this election]," or in fact changed those rules and standards after they had begun counting the ballots in this election. Such departures by county canvassing boards would appear to violate 3 U.S.C. §5, to deprive the choice made by ballot on election day of conclusivity and to require the Florida Legislature to appoint Electors. Nor does it appear that any such departures merely constituted the application to these circumstances of previously established legal principles—such as the primacy of the will of the people or the importance of determining ballot-by-ballot the intent of the voter. Such principles, invoked by the court below, are of such a high level of generality that they do not constrain at all and certainly do not offer the assurance required by section 5 that the State not change the rules after the election has been held to suit the political circumstances. The fact is that there are many possible tests for judging the intent of the voter, and having chosen certain tests before the election as those best calculated to determine that intent, it would appear that the county canvassing boards cannot change the tests in midstream.

[4] *See* FLA. STAT. §§102.111-112 (setting forth the deadlines); FLA. STAT. §106.23(2) ("The Division of Elections shall provide advisory opinions when requested The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought"); FLA. STAT. §97.012 ("The Secretary of State is the chief election officer of the state, and it is his or her responsibility to: (1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.")

Each of these departures from existing law may mandate a finding that Florida's election process has violated Section 5. If so, unless corrected – by the Florida Legislature or as ordered by this Court – those violations may jeopardize Florida's participation in the Electoral College.

4. The Consequences Of A Decision By This Court That The Florida Electoral Process Has Not Conformed To Pre-existing Law.

If this Court finds a violation of 3 U.S.C. §5, then it can order the Florida courts to correct the deviations from pre-existing law. Assuming these deviations are corrected by December 12, then the electoral process will have produced a result that conforms with 3 U.S.C. §5, and there would be no occasion for state legislative action.

Alternatively, the Court might conclude there was a violation of 3 U.S.C. §5, but the violation cannot be corrected by December 12. This might be the case, for example, if the Court concludes that any manual recounts must be conducted under the pre-existing standard and there is not enough time to re-do the manual recounts under that standard. In that case, the Florida Legislature would be obliged to appoint Electors under 3 U.S.C. §2 by December 18.

More complicated is the answer to the negative pregnant: what would be the consequences if this Court does *not* find that the Supreme Court of Florida violated 3 U.S.C. §5? Of course, if this Court should make such a ruling, the Florida Legislature, like other organs of government, state or national, would be bound to honor that determination. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). But the precise consequences would depend on the reasons given by the Court for its decision.

If the Court does not make the finding because it concludes that the issue is not justiciable, then the Florida Legislature would itself be required to decide whether the election results comported with pre-existing law, and if the Florida Legislature

does not make such a decision by December 18, Congress would be obliged to decide the issue on January 6.

Alternatively, if the Court limits its ruling, as Question 3 suggests, to whether the Supreme Court of Florida has deviated from pre-existing rules, it would remain incumbent upon the Florida Legislature and Congress to decide whether the apparent deviations from prior standards by the county canvassing boards were sufficient to justify legislative appointment of Electors under 3 U.S.C. §§2, 5, 15, and U.S. CONST. Art II, §1.

Finally, the Court might determine that departures from pre-existing methods and procedures by the Supreme Court of Florida are not sufficiently egregious to warrant correction by this Court. In that event, we would ask the Court also to rule that the Florida Legislature and Congress need not apply the same deferential standard and would thus not be bound by this determination in deciding whether, under the separate powers assigned to them by the Constitution, to appoint or count Electors.

CONCLUSION

The Court should rule that Questions 1 and 2 are not justiciable because their resolution lies in the hands of the Florida Legislature or, if it does not act, the Congress. If this Court nonetheless reaches those questions and concludes that the election decisions below deviated from pre-existing law, then the Court should order those deviations to be corrected before December 12, in which case the Electors will be determined by the choice of the voters under those pre-existing rules. If those deviations cannot be corrected by December 12, then it will become necessary for the Florida Legislature to exercise its authority to appoint Electors to comply with its constitutional duty to assure Florida is represented in the Electoral College.

Respectfully submitted,

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November 28, 2000
Al Gore Brief for December 1, 2000 United States Supreme Court Hearing to Review Florida Supreme Court Ruling

No. 00-836

IN THE

Supreme Court of the United States

George W. Bush,
Petitioner,
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Palm Beach County Canvassing Board, *et al*.,
Respondents.

On Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF RESPONDENTS
AL GORE, JR., AND FLORIDA DEMOCRATIC PARTY

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November 28, 2000

STATEMENT OF THE CASE

This case involves a decision of the Florida Supreme Court interpreting Florida's Election Code in accord with the laws and constitution of the State of Florida. Petitioner attempts to convert the state law issues decided by the Florida court into questions of federal law under 3 U.S.C. § 5, Article II, § 1, cl. 2 of the United States Constitution, and the Due Process Clause of the Fourteenth Amendment. But in fact the Florida court applied garden variety principles of statutory interpretation to resolve ambiguities and reconcile conflicting provisions within the Florida Election Code. Even if federal law had something to say about the scope of state judicial authority to construe state legislation, which it does not, the decision below effected no "change" in Florida law "which cannot be reconciled with state statutes enacted before the election." See Pet. i (Question Presented 2).

In any event, petitioner flatly misreads the provisions of federal law on which he relies. Section 5 of Title 3 does not "require[]" the States to do anything, contrary to the phrasing of the first Question Presented, but merely offers to the states a safe harbor with respect to controversies regarding electors that might arise before Congress when the electoral votes are counted. As to the additional question framed by this Court, there can be no judicial remedy for failure to "comply" with Section 5.

Moreover, Article II, § 1, cl. 2 does not cut into the authority of state courts to review and construe state election statutes under state law and thus would not be offended in this case even if the Florida Supreme Court had made "new" law. Nothing in the Constitution's several delegations of power to the "legislatures" of the States has ever been held to limit the role of the other branches of state government in the lawmaking process, including the authority of the state courts to act as final expositors of the meaning of the statutes enacted pursuant to those delegated powers. Nor would the decision below rise to the level of a due process violation, even if its construction of Florida law were wrong. Consequently, the judgment

below should be affirmed.

1. Background. On November 7, 2000, Florida citizens cast almost 6,000,000 ballots in the general election for President of the United States. Under Florida's election law, this election's outcome would determine which slate of electors would cast Florida's twenty-five electoral votes for President. Fla. Stat. § 103.

The State Elections Canvassing Commission, which ordinarily is composed of the Governor, the Secretary of State, and the Director of the Division of Elections, is charged with certifying the results of statewide elections based on the "total number of votes cast for persons for said office." Fla. Stat. §§ 102.111(1), 102.121 (2000).[1] The State Commission bases its certification on certifications submitted by the individual election canvassing boards of Florida's sixty-seven counties.

Based on initial returns transmitted to it by the county canvassing boards on Wednesday, November 8, 2000, the Florida Division of Elections reported that petitioner Governor George W. Bush had received 2,909,135 votes for President and that respondent Vice-President Al Gore had received 2,907,351 votes.

Because the margin between the two leading candidates was less than one-half of one percent of the total votes cast for that office, the provisions of Florida's election law relating to recounts and certification of election results required an automatic recount of the ballots. Fla. Stat. § 102.141(4). The Election Code does not mandate any specific process for conducting this recount. Most counties simply repeated whatever process, usually a machine count, they had used to tabulate the ballots initially. Others, however, conducted manual recounts. At the end of this initial automatic recount, the margin between candidates Gore and Bush was reduced

[1] On November 8, 2000, Florida Governor Jeb Bush removed himself from the commission. See Pet. App. at 14a n.17.

from the initially stated 1,784 votes to 300 votes.

To recheck the results, Florida law provides that counties may conduct a further manual recount to address any "error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). Any candidate "may file a written request with the county canvassing board for a manual recount" "prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later." *Id.* § 102.166(4)(a), (b). The request must "contain a statement of the reason the manual recount is being requested." *Id.* § 102.166(4)(a).

If a county canvassing board grants a request for a manual recount, it need not initially order such a manual recount county-wide. Rather, an initial manual recount need only "include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue * * * . The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts." Fla. Stat. § 102.166(4)(d). The statute further provides that:

> If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board *shall*:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.

Id. § 102.166(5) (emphasis added).

These procedures for conducting manual recounts require that the

county canvassing board appoint counting teams of at least two electors who are members of different political parties. Fla. Stat. § 102.166(7). If a counting team is unable to determine a voter's intent in casting a ballot, the ballot must be "presented to the county canvassing board for it to determine the voter's intent." *Id.* § 102.166(7)(a)-(b).

After the automatic statewide recount reduced the margin between Governor Bush and Vice-President Gore to 300 votes, petitioner declined to request a manual recount in any county. The Florida Democratic Party requested a manual recount in four Florida counties: Palm Beach, Volusia, Broward, and Miami-Dade. Two of those counties, Palm Beach and Broward, are parties to the instant litigation. Pursuant to those requests and the requirements of Section 102.166(4)(d), the county canvassing boards of those counties conducted a sample manual recount of one percent of the total votes cast in their respective counties.[2]

[2] Both Palm Beach County and Broward County employ a punch card balloting system. Voters in the counties are given a rectangular card ballot covered with perforated squares. Although the squares are numbered, the candidates' names do not appear on the ballot. Voters are instructed to slide the card into a machine, which holds a book listing the candidates for office next to a series of holes. Voters are told to insert a stylus into the hole next to their candidate of choice. The aim of the voting machine design is that the stylus be inserted in such a way that a "chad," one of the perforated squares, is completely separated from the ballot. If this happens, a machine reader generally will later be able to count the votes reflected on the ballot. Unfortunately, a chad does not always fully separate from a ballot when punched by a stylus. The chad may only partially detach from the card, or, if the voting machine is old or has become clogged with chads from previous voters, the ballot may only be indented, or "dimpled." The machine reader will not be able to read the ballot. Such uncounted ballots are called "undervotes."

Because of the high percentage of undervotes created by punch card voting systems, the vast majority of counties in Florida do not use them. In Broward County, the undervote in the November 7, 2000, election for President was over 6,000 ballots. In Palm Beach County, it was 10,750 ballots. Absent a manual recount, the votes reflected on these ballots would not be counted in the election.

At the conclusion of those initial recounts, each of the four county canvassing boards determined that the sample had revealed tabulation discrepancies that could affect the outcome of the election and decided, consistent with the requirements of Section 102.166(5)(c), to manually recount *all* of the ballots.

Concerned that it would not be able to complete the full county recount in time, the Palm Beach County Canvassing Board, pursuant to Section 106.23, sought an advisory opinion from the Division of Elections of the Florida Department of State. The Division of Elections responded by issuing Advisory Opinion DE 00-10, stating that all county returns had to be received by November 14. Secretary of State Katherine Harris then issued a statement on Monday, November 13, announcing that she would not accept any county vote certifications received after 5:00 p.m. on November 14. On that date, she issued two further opinions. In one, she stated that manual recounts were authorized under Florida law only when there existed a software defect or mechanical error in the vote tabulation equipment. In the other, she asserted that undertaking statutorily authorized manual recounts would not excuse a failure to comply with the 5:00 p.m. deadline for transmitting results. Later that day, the Attorney General of Florida issued an opinion squarely disagreeing with the Secretary of State's conclusion that a recount could be authorized only on the basis of a "voting tabulation error" caused by a defect in the machine itself.

2. Procedural History of This Litigation. On November 13, 2000, Volusia County, joined later by Palm Beach County, filed an action in the Circuit Court of the Second Judicial Circuit in Leon County, seeking a declaratory judgment that the county was not bound by the November 14, 2000, deadline set by the Secretary of State for submitting certified vote totals and requesting an injunction prohibiting the Secretary from ignoring election returns resulting from manual recounts authorized by Florida law but submitted after that date. Candidates Gore and Bush both intervened. On November

14, the Leon County Circuit Court held that, although the county canvassing boards were required in the first instance to comply with the statutory deadline, they could file supplemental returns reflecting the outcome of hand recounts. Pet. App. at 44a-50a. The court enjoined the Secretary against preemptive rejection of supplemental certificates, admonishing her that she could not "decide ahead of time what late returns should or should not be ignored," but was instead required "to exercise her discretion" and "consider[] all attendant facts and circumstances" before deciding whether to accept revised or amended returns. Pet. App. at 48a-50a. The counties appealed this first order to the First District Court of Appeals.

In response to the Leon County Circuit Court's order, Secretary Harris issued a directive requiring that all counties intending to submit late returns inform her of that fact and of the reasons for the late returns by 2:00 p.m. on Wednesday, November 15. Four counties did so. The Secretary again rejected the amended returns and announced that she would rely on the earlier certified totals for the four counties. The Florida Democratic Party and Vice-President Gore filed a motion in the Leon County Circuit Court seeking to enforce that court's prior injunction against the Secretary. On Friday, November 17, the Leon County court ruled that the Secretary's actions had not violated the court's injunction. Pet. App. at 42a-43a. The Florida Democratic Party and Vice-President Gore appealed this second order, and the First District Court of Appeals certified both appeals for immediate review by the Florida Supreme Court.

3. The Florida Supreme Court. On Tuesday, November 21, 2000, after full briefing and oral argument, the Florida Supreme Court issued a unanimous opinion interpreting the Florida Election Code and pointedly noting that "[n]either party has raised as an issue on appeal the constitutionality of Florida's election laws." Pet. App. at 10a n.10. The court interpreted the Florida Election Code to require county canvassing boards to submit their returns to the

Secretary of State by 5:00 p.m. of the seventh day following the election, pursuant to Section 102.111. *Id.* But the court eliminated the resulting incoherence in the statutory scheme by further holding that the county boards may also submit subsequent amended returns to reflect statutorily authorized recounts under Section 102.166, which the Secretary may reject only if they come so late as to preclude a candidate, elector, or taxpayer from contesting the certification of an election pursuant to Section 102.168, or to prevent Florida voters from participating fully in the federal electoral process pursuant to 3 U.S.C. §§ 1-10. Pet. App. at 33a n.55.

The court reached this result by applying familiar principles of statutory construction to resolve the textual ambiguities and gaps in the Florida Election Code, guided by an appreciation of the importance of the right to vote under Florida's constitution and laws. The court began by explaining that, "[w]here the language of the Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code." Pet. App. at 23a. "[H]owever, chapter 102 is unclear concerning both the time limits for submitting the results of a manual recount and the penalties that may be assessed by the Secretary." *Id.* "In light of this ambiguity, the Court must resort to traditional rules of statutory construction in an effort to determine legislative intent." *Id.* at 24a.

The ambiguity identified by the state supreme court arose from two Florida statutes that define the obligation of the county canvassing boards to transmit their certifications to the Secretary of State. Section 102.111 provides that county returns must be transmitted to the Secretary of State no later than 5:00 p.m. of the seventh day following the election and that any missing counties "*shall* be ignored." (Emphasis added). By contrast, Section 102.112(1), which the Florida legislature enacted subsequently, provides that any county returns not received by 5:00 p.m. on the seventh day "*may* be ignored." (Emphasis added).

Further, Section 102.166 (the "protest" provision) grants a candidate the statutory right to request a manual recount at any point prior to certification by a canvassing board, and such action can lead to a full recount of all votes in the county. The Florida Supreme Court observed that "logic dictates that the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days." Pet. App. at 21a. The court held that the protest provision thus conflicted with any reading of Section 102.111 that imposed an unalterable deadline. "For instance, if a party files a pre-certification protest on the sixth day following the election and requests a manual recount and the initial recount indicates that a full countywide recount is necessary, the recount procedure in most cases could not be completed by * * * 5:00 p.m. of the seventh day following the election." Pet. App. at 21a.

The Florida Supreme Court applied four traditional canons of construction to resolve the ambiguity of the Election Code: "First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general." Pet. App. 24a n.42 (citing *State ex rel. Johnson* v. *Vizzini*, 227 So. 2d 205 (Fla. 1969)). The court found that Section 102.111 (the "shall" provision) addresses the general makeup and duties of the Elections Canvassing Commission, and "*only tangentially* addresses the penalty for returns filed after the statutory date." *Id.* at 25a. Section 102.112 (the "may" provision), by contrast, "constitutes a specific penalty statute that defines both the deadline for filing returns and the penalties for filing returns thereafter * * * ." *Id.* (Emphasis added).

"Second, it is also well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute." Pet. App. at 25a (citing *McKendry* v. *State*, 641 So. 2d 45 (Fla. 1994)). Section 102.112 ("may") was enacted in 1989; Section 102.111 ("shall") was enacted almost four decades earlier, in 1951.

Id.

"Third, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision." Pet. App. at 26a. Section 102.112 contains a detailed provision authorizing the assessment of fines against the members of a dilatory county canvassing board. "If, as the Secretary asserts, the Department were required to ignore all returns received after the statutory date, the fine provision would be meaningless." *Id.* "For example, if a Board simply completed its count late and the returns were going to be ignored in any event, what would be the point in submitting the returns? The Board would simply file no returns and avoid the fines. But, on the other hand, if the returns submitted after the statutory date would not be ignored, the Board would have good reason to submit the returns and accept the fines." *Id.* at 24a-25a.

"Fourth, related statutory provisions must be read as a cohesive whole." Pet. App. at 25a (citing *Sun Ins. Office, Ltd.* v. *Clay*, 133 So. 2d 735 (Fla. 1961)). The court held that reading Section 102.111 as an iron-clad deadline would conflict with the protest right provided in Section 102.166, because in many cases a full manual recount obviously could not be completed by 5:00 p.m. on the seventh day after the election. *Id.* at 26a. In addition, overseas ballots cannot be counted until after the seven-day deadline has expired. *Id.* at 27a.

Based on these principles, the court held that the permissive language of Section 110.112 necessarily superseded the apparently mandatory language of Section 102.111. See Pet. App. at 2a n.1. The court explained that "we have used traditional rules of statutory construction to resolve these ambiguities to the extent necessary to address the issues presented here. We decline to rule more expansively, for to do so would result in this Court substantially rewriting the Code. *We leave that matter to the sound discretion of the body best equipped to address it – the Legislature.*" *Id.* at

37a (emphasis added).

Having determined that the Secretary was permitted to accept returns filed after the deadline, and in light of the importance of the right to vote under the Florida Constitution, Pet. App. at 29a, the court also determined the scope of the Secretary's discretion to "ignore" returns submitted after the seven-day period for initial certification.[3] The court concluded that, under the statutory scheme, the manual recounts should be "allowed to proceed in an expeditious manner." *Id.* at 32a. It noted that – as all must concede – "[i]gnoring the county's returns is a drastic measure," *id.*, and it held that the Secretary's discretion to reject "amended returns that would be the result of ongoing manual recounts" provided for by state law, *id.* at 34a, was limited to "returns * * * submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal election process." *Id.* at 35a.

The court invoked its standard equitable powers to ensure the counting of all lawfully cast votes while allowing adequate time to satisfy Florida's contest provisions and federal electoral college deadlines. Pet. App. at 37a-38a. After noting that the court at oral argument had inquired whether the presidential candidates were interested in the court's consideration of reopening the opportunity for recounts in additional counties, and that neither candidate had requested such an opportunity, *id.* at 38a n.56, the court set deadlines designed to protect the interests of candidates in contesting certification, and the interests of Florida's voters in being able to

[3] In fact, the Secretary admits both that she has discretion not to reject untimely certifications and that she does not apply that deadline to overseas absentee ballots. Although the Secretary contends that she is required to accept such ballots for ten days after the election because of federal law, both Florida law and federal law require that absentee ballots be received by the date of the election. See Fla. Stat. § 101.67; 42 U.S.C. §§ 1973aa-1, 1973ff-2. See note 22, *infra*.

participate in the electoral college process. Specifically, the court ruled that the Secretary should accept amended certificates reflecting manual recounts if they were filed by 5:00 p.m. on Sunday, November 26.

On November 22, the Miami-Dade County Canvassing Board announced that it would not conduct a manual recount because it could not comply with the November 26 deadline. On November 26, the Secretary of State denied a request by the Palm Beach County Canvassing Board for an extension until the morning of November 27 to complete its manual recount. Palm Beach County then submitted the results of its partially completed manual recount, which the Secretary refused to accept. At approximately 7:30 p.m. on November 26, 2000, the Secretary of State certified that George W. Bush had received 2,912,790 votes in Florida and Al Gore, Jr., 2,912,253 – a difference of 537 votes.

SUMMARY OF ARGUMENT

This dispute over the Florida Supreme Court's interpretation of the Florida Election Code is a state-law case that, despite its undoubted importance, does not belong in federal court. The process legislatively adopted by Florida for resolving disputes regarding the appointment of electors includes state judicial review. Principles of federalism counsel strongly against interference by this Court, or any federal court, in that process. The federal claims purportedly presented by petitioner are insubstantial.

I. The entire petition rests on intemperate and insupportable mischaracterizations of the Florida Supreme Court's decision as usurping the role of the state legislature. In fact, the Florida court played a familiar and quintessentially judicial role: it interpreted Florida law "us[ing] traditional rules of statutory construction to resolve [statutory] ambiguities." Pet. App. at 37a. Hence, this case does not in fact present the first two questions framed by petitioner.

II. Even if the Florida Supreme Court's decision could be said to have "enact[ed]" new law (first Question Presented) or to be irreconcilable "with state statutes enacted before the election was held" (second Question Presented), the court's decision did not violate 3 U.S.C. § 5 for the simple reason that Section 5 does not impose any mandate or requirement on the States – nor could it do so consistent with Article II, § 1 or settled principles of federalism. Properly understood, Section 5 merely offers the States a safe harbor with respect to a hypothetical controversy that has not yet arisen – a dispute over electors that might arise before Congress when the electoral votes are counted. Accordingly, apropos the additional question framed by this Court, there can be no judicial remedy for failure to comply with Section 5.

III. In any event, the Florida Supreme Court's decision complies with 3 U.S.C. § 5. Section 5 offers a safe harbor to determinations that are made "by judicial or other methods or procedures" "provided[] by laws enacted prior to" election day. Florida meets this test because it has long provided, under laws enacted prior to November 7, 2000, for judicial resolution of disputes regarding questions of state law, including those relating to the appointment of presidential electors.

IV. The Florida Supreme Court's decision also is entirely consistent with Article II, § 1, cl. 2 of the United States Constitution, which provides that "Each State shall appoint" electors "in such Manner as the Legislature thereof may direct." This provision neither displaces the state judiciary nor forbids it from undertaking statutory interpretation pursuant to state law. Thus, where a state legislature has enacted an election code (as Florida has), nothing in Article II, § 1, cl. 2 prevents the state courts from playing whatever interpretive role state law grants to them.

V. Finally, nothing in the Florida Supreme Court's decision raises

due process concerns of "retroactive" changes in state law. To the contrary, due process is furthered by ensuring, as the Florida Supreme Court has attempted to do, that as many votes as possible are fairly and accurately counted.

ARGUMENT

I. THE FLORIDA SUPREME COURT'S DECISION DID NOT ABROGATE EXISTING FLORIDA STATUTORY LAW.

Petitioner's claims – under 3 U.S.C. § 5, Article II, and the Due Process Clause – are all premised on his thesis that the Florida Supreme Court retroactively altered the Florida legislature's scheme for counting ballots cast in the presidential election. As we will demonstrate below, these provisions of federal law are not bases for invalidating a construction of state law by the state courts with which petitioner, or even this Court, disagrees. Petitioner's repeated attempts to persuade this Court that the Florida Supreme Court misapplied state law, *e.g.*, Reply Br. On Pet. for Certiorari [hereinafter "Pet. Rep."] at 6 (state court decision "deviate[d]" from state law), accordingly, cannot state the basis for a federal claim. But before exploring the weakness of petitioner's specific claims, we address the assumption that underlies all of petitioner's Questions Presented – namely, that the decision of the Florida Supreme Court somehow created a "new legal rule" that amended Florida law in "retroactive" fashion. That is simply not so. The decision by the Florida Supreme Court was an ordinary exercise in statutory interpretation, admittedly dealing with an important and hotly contested issue, but one governed by state laws that long antedate this election. The decision therefore could not be the sort of "new legal rule" that could possibly offend the Due Process Clause or Article II, § 1, cl. 2, or take Florida out of the safe harbor of 3 U.S.C. § 5.

Whether one agrees or disagrees with the decision as a matter of Florida law, it cannot be denied that the court applied ordinary principles of judicial interpretation to a complex statutory scheme. The state supreme court addressed the seven-day deadline for filing certified results set out in Sections 102.111 and 102.112, seeking to resolve a patent conflict between one provision saying that returns filed after seven days "shall" be ignored and another saying that those returns "may" be ignored. Reading Section 102.111 to create an absolute, inflexible deadline, the court held, would do violence to Section 102.112, which is the later-enacted, more specific provision addressing both the deadline for filing returns and the penalties for filing returns thereafter.[4] It would be incorrect as a matter of statutory interpretation to override Section 102.112 with the earlier, more general provision of Section 102.111, which is directly concerned not with the deadline for filing returns but rather with establishing the general makeup and duties of the Elections Canvassing Commission. Further, reading Section 102.111 as an absolute, exceptionless deadline would render meaningless, said the court, the detailed provision in Section 102.112 authorizing the assessment of fines against the members of a dilatory county canvassing board. Such a reading would also conflict with the statutory protest right provided in Section 102.166, because in many cases a full manual recount simply cannot be completed by 5:00 p.m. on the seventh day following the election. And it would conflict with the Secretary of State's discretion to accept late-filed returns. The court accordingly gave credence to the more specific, more recently enacted provision, utilizing canons of construction certainly familiar to and routinely relied on by this Court. See Pet. App. at 24a-25a.

[4] Petitioner's view that Section 102.112 is restricted to the circumstances of *Chappell* v. *Martinez*, 536 So. 2d 1007 (Fla. 1988) (see Pet. at 14 n.3), is belied by the very text of Section 102.112, which is obviously not so limited. In any event, the Florida Supreme Court's decision finding this state-law argument unpersuasive is hardly extraordinary.

The court relied upon the plain text of the statute, and in particular its statement that the "official return of the election" must include "write-in, absentee and manually counted results." Pet. App. at 27a-28a. Accordingly, the court concluded that, although the county canvassing boards *are* required to submit their returns by 5:00 p.m. on the seventh day following the election, the Secretary was *not* required to ignore supplemental certifications after that date. Rather, the court held, under Section 102.112, she was merely *permitted* to ignore supplemental certifications filed after that date. *Id.* at 28a.

The court then addressed the scope of the Secretary's discretion to ignore such supplemental certifications. It concluded, in light of the state constitution[5] and the provisions outlining detailed procedures for manual recounts, that the Secretary's discretion to ignore the results of those manual recounts was limited. Pet. App. at 28a-34a. It found that she lacked discretion to ignore supplemental certifications of returns that are submitted late solely "because the Board is acting in conformity with other provisions of the Code," see *id.* at 36a, unless the returns are submitted too late for Florida to make the

[5] The Florida Constitution has long been interpreted as guaranteeing vigorous protection of the right to vote. See*, e.g., Beckstrom* v. *Volusia County Canvassing Bd.*, 707 So.2d 720, 725 (Fla. 1998) (recognizing that the "will of the voters" is paramount); *Chappell* v. *Martinez,* 536 So.2d 1007 (Fla. 1988) (because right to vote is guaranteed by constitution, mere technical noncompliance cannot justify a refusal to count validly cast votes); *Boardman* v. *Esteva,* 323 So. 2d 259, 263 (Fla. 1975) ("[t]he right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard."); *Barancik* v. *Gates*, 134 So. 2d 497, 499-500 (Fla. 1961) (right to vote is the "keystone in the arch of liberty."); *Special Tax Sch. Dist.* v. *Florida*, 123 So. 2d 316, 323 (Fla. 1960) (election statutes must be construed in favor of the voter); *State ex rel. Titus* v. *Peacock*, 170 So. 309 (Fla. 1936) (ballots cast by qualified voters not to be thrown out if capable of being given proper effect); *State* v. *Gibbs*, 13 Fla. 55, 7 Am. Rep. 233 (1869) (when legal returns are received by state board of canvassers at any time before canvass is complete, which could have been counted if received on the day appointed by law, those votes must be counted).

federal December 12 deadline.

The act of interpreting and reconciling ambiguous or apparently conflicting statutory provisions is an exercise with which this Court is thoroughly familiar and has never been regarded as the "making" of law exceeding the bounds of the judicial role.[6] See, *e.g.*, *United States* v. *Estate of Romani*, 523 U.S. 517, 534 (1998) (examining "how Congress would want the conflicting statutory provisions to be harmonized"); *District of Columbia* v. *Pace*, 320 U.S. 698, 702 (1944) (confronting the conflicting provisions of a District of Columbia statute and deferring to the conclusion of the United States Court of Appeals for the District of Columbia); *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 543 (1940) (observing that the Court often "has followed th[e] purpose, rather than the literal words" of legislation (footnote omitted)); *J.C. Penney Co.* v. *Commissioner*, 312 F.2d 65, 66 (CA2 1962) (Friendly, J.) ("[I]t is as clear as anything ever can be that Congress did not mean what in strict letter it said").[7]

[6] "Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947). Thus, Judge Learned Hand was able to reject administrative interpretation and subsequent legislative action in construing a disputed portion of the Selective Training and Service Act of 1940, ch. 720, § 8(b), 54 Stat. 885, 890 (expired 1947), because "upon the courts rests the ultimate responsibility of declaring what a statute means." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 790 (CA2), *aff'd*, 328 U.S. 275 (1946).

[7] The Florida Supreme Court's interpretation of Florida's election law is no different from this Court's interpretation of many federal statutes, interpretations that have often become the target of the rejected criticism that the Court is "making" law. See, *e.g.*, *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989); *id.* at 527-28 (Scalia, J., concurring); *id,* at 531-32 (Blackmun, J., dissenting); *FDA* v. *Brown & Williamson Co.*, 120 S. Ct. 1291, 1306 (2000) ("Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction."); *id.* at 1316-25 (Breyer, J., dissenting); *West Virginia Univ. Hosps.* v. *Casey*, 499 U.S. 83, 93-97 (1987); *id.* at 115 (Stevens, J., dissenting); *Christensen*

The text-oriented canons of construction on which the Florida Supreme Court relied are garden variety interpretive rules "designed as short-cuts to the discovery of the legislature's 'true' intent."[8] They are "commonsensical"[9] linguistic and syntactic guides for finding meaning in statutory text as illuminated by "principles that involve predictions as to what the legislature must have meant, or probably meant, by employing particular statutory language."[10] Such canons effectuate the legislation's purpose; they do not create new law. Hence, this Court has recognized that employing these canons does not constitute forbidden judicial lawmaking, for they are merely "part

v. *Harris County*, 120 S. Ct. 1655, 1661 (2000) (interpreting statute in context of overall statutory scheme and finding Secretary's interpretation unreasonable); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 546-48 (1994); *id.* at 549-57 (Souter, J., dissenting); *Chisom* v. *Roemer*, 501 U.S. 380, 395-400 (1991); *id.*, at 404-09 (Scalia, J., dissenting); *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 698-704 (1995); *id.* at 709-11 (O'Connor, J., concurring); *id.* at 715-21 (Scalia, J., dissenting); *McNally* v. *United States*, 483 U.S. 350, 355-60 (1987); *id.* at 361 (Stevens, J., dissenting).

[8] Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and its Consequences*, 45 VAND. L. REV. 743, 743 (1992). See generally William N. Eskridge, Jr., and Phillip P. Frickey, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 634-716 (2d ed. 1995); William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION (1994); Otto J. Hetzel et al., LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS 389-91, 622-702 (2d ed. 1993); Cass R. Sunstein, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 150-57 (1990).

[9] Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 26 (1997). See also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 ("[T]he 'traditional tools of statutory construction' include not merely text and legislative history but also, quite specifically, the consideration of policy consequences * * * . [O]ne of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce * * * results less compatible with the reason or purpose of the statute.").

[10] Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992).

of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wisconsin Dept of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992) (per Scalia, J.); *United States Dept of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992) (noting assumed legislative familiarity with canons); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) ("canons of construction are no more than rules of thumb that help courts determine the meaning of legislation").

Nor, of course, were these canons of construction newly minted by the Florida Supreme Court. Long before the instant election, that court was established as the supreme expositor of Florida law. See, *e.g.*, *Dade County Classroom Teachers Ass'n* v. *Legislature of the State of Fla.*, 269 So. 2d 684, 686 (Fla. 1972) ("The doctrine of judicial authority and responsibility was early established in the historic case of *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)."). Accordingly, the Florida Supreme Court has been the entity charged by the people of Florida with the task of interpreting ambiguous or conflicting provisions of the Florida Election Code. For example, in *State ex rel. Drew* v. *McLin*, 16 Fla. 17 (1876), the Florida Supreme Court construed, in the context of a post-election contest, the power of the Florida Board of State Canvassers under an 1868 statute and issued a writ of mandamus compelling the state board to meet and include votes of certain counties. Similarly, in *State ex rel. Knott* v. *Haskell*, 72 So. 651 (Fla. 1916), the state supreme court granted a writ of mandamus to require county election commissioners to perform a recount in the primary election for the Democratic gubernatorial nominee.[11] In *State ex rel. Peacock* v.

[11] The court rejected a statutory construction under which a recount would have been precluded once the ballots had been delivered in a sealed ballot box to the Supervisor of Registration. 72 So. at 659. The court considered several provisions of the Election Code and concluded that "[t]he general election law contains no evidence

Latham, 170 So. 475, 478 (Fla. 1936), the court held that a statute setting a twenty-day deadline for the submission of names of nominated candidates did not apply when election officials had failed to properly count and return the ballots cast in the primary election.[12] In *State ex rel. Andrews* v. *Gray*, 125 Fla. 1 (1936), the court held

whatever of a legislative purpose to make the first determination of a board of inspectors to be forever final, notwithstanding such determination may have been induced by fraud or reached by disregarding the requirements of the statute or arrived at by the grossest and most flagrant errors, mistakes and misconception of duty, and, in the absence of such legislative purpose, we think that it would be the duty of the court in a proper case by writ of mandamus to order the inspectors to make their returns and certificates speak the truth if by any possibility it could be accomplished." *Id.* at 660.

[12] "The statute involved here must be considered in paria materia with other statutes governing the holding of Primary Elections * * * . A deviation from the proper performance of the duties of the election officials, as in this case, may so frustrate the contemplated orderly procedure as to make inapplicable provisions of this statute which would otherwise be held to be mandatory." 170 So. at 478. "The duties of a State Canvassing Board of Primary Elections are * * * ministerial. Under the Primary Election Law of this State the vote actually cast determines the rights of the candidates. If the vote actually cast is through error or fraud, by accident or design incorrectly returned so that a candidate may be deprived of his rights it is difficult to understand how it can reasonably be urged that no power exists to correct the error." *Id.* at 479. See also *Beckstrom* v. *Volusia County Canvassing Bd.*, 707 So. 2d 720, 726 (Fla. 1998) (holding that election code prohibited county practice of re-marking ballots for optical scanner, "even though the process was widely used, recommended by the manufacturer's representative, and approved by the state Division of Elections"); *State ex rel. Chappell* v. *Martinez*, 536 So. 2d 1007, 1009 (Fla. 1988) (holding that seven-day deadline of Section 102.111 was satisfied when county transmitted election results telephonically to Secretary of State within seven days after the election, even though vote counts were not received in writing prior to deadline); *State ex rel. Fair* v. *Adams*, 139 So. 2d 879, 883-84 (Fla. 1962) (interpreting state statutes to determine that a ballot containing the name of the same individual as a candidate for several offices was illegal, while conceding that "neither our constitutional prohibition nor statutory oath requirement expressly precludes a candidate from seeking numerous offices"); *McConihe* v. *State ex rel. McMurray*, 17 Fla. 238 (1879) (ordering an election to be held after the time prescribed by statute for the holding of the election had passed).

that the state judiciary retains the power to reconcile apparently conflicting election statutes by "supplement[ing] the intendments of the positive words, fill[ing] in the vacant spaces, and * * * correct[ing] uncertainties and harmoniz[ing] results with justice through a method of judicial decision." *Id.* at 18. The court observed, "You may call this process legislation, if you will. In any event, no system of *jus scriptum* has been able to escape the need of it." *Id.* at 19-20. See also *Advisory Opinion to Governor*, 157 Fla. 885, 889 (1946), 27 So. 2d 409 (judicial interpretation of laws governing replacement of Senator who died in office necessary where statutes produced only "hopeless confusion"); cf. *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in judgment) ("I am not so naive (nor do I think our forebearers were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it--discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.")

Indeed, the Florida legislature has itself plainly acquiesced in state judicial resolution of election disputes in presidential elections. In Section 102.171, it provided that the legislature, not the courts, should resolve disputes involving elections of state legislators. By contrast, it assigned to the courts the duty of resolving all other election disputes, including those arising in presidential elections. See Fla. Stat. § 102.168(1).

Nor is it relevant that the Florida Supreme Court was not asked to resolve the particular ambiguities and conflicts within the Florida Election Code at issue here until after November 7. It is quite typical for interpretations of state electoral law to be made after the election has been held. See, *e.g.*, *State ex rel. Peacock* v. *Latham*, 170 So. 2d 475, 478 (Fla. 1936); *State ex rel. Knott* v. *Haskell*, 72 So. 651 (Fla. 1916); *State ex. rel. Drew* v. *McLin*, 16 Fla. 17 (1876). Indeed, most disputes about the meaning of a law arise only after an event takes place whose significance under that law is contested.

State courts as well as attorneys general are routinely called upon to interpret and construe state election laws to resolve post-election disputes.[13] Permitting state courts to interpret their laws – in ways that will, by definition, disappoint one or another litigant – does not violate either 3 U.S.C. § 5, even under petitioner's strained reading, or the federal Constitution. At bottom, petitioner's contention is that the Florida Supreme Court committed an error in interpeting state law. This argument does not describe post-election judicial legislation.

Although petitioner's attack on the supposed usurpation of lawmaking authority by the Florida Supreme Court is, to be sure, hitched to the wagon of Article II and Title 3, its basic thrust reaches well beyond those sources of law. Not to rebuff that attack decisively would cast a shadow of illegitimacy over much of the indispensable and wholly lawful work of this Court and of state and federal courts throughout the nation.

II. TITLE 3, SECTION 5 PROVIDES ONLY A RULE FOR DETERMINING WHETHER A STATE'S ELECTORS SHALL BE SUBJECT TO CHALLENGE BEFORE CONGRESS; IT DOES NOT PROHIBIT ANY ACTION OR DECISION BY A STATE.

Petitioner argues that the decision of the Supreme Court of Florida "violates" the "federal mandate" contained in 3 U.S.C. § 5, which, he has represented to this Court, "requires States to resolve any disputes over the appointment of electors by exclusive reference to state laws 'enacted prior to' election day." Pet. Rep. at 2 (quoting 3 U.S.C. § 5). This Court has accordingly directed the parties to

[13] See, *e.g.*, *State ex rel. Stephens* v. *Marsh*, 221 N.W. 708 (Neb. 1928); *State ex rel. Dahlman* v. *Piper*, 69 N.W. 378 (Neb. 1896); *Woods* v. *Sheldon*, 69 N.W. 602 (S.D. 1896); Miss. Op. Att'y Gen. No. 1999-0697 (Dec. 22, 1999), 1999 WL 1333481; Tex. Op. Att'y Gen. No. JC-0293 (Oct. 11, 2000), 2000 WL 1515422; Ark. Op. Att'y Gen. No. 94-366 (Nov. 21, 1994), 1994 WL 702001.

brief and argue the question of what the "consequences [would be] of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. Sec. 5." See *Bush* v. *Palm Beach County Canvassing Bd.*, No. 00-836 (Nov. 24, 2000) (Order granting certiorari).

A. SECTION 5 IS A SAFE HARBOR OPTION, NOT A MANDATE

As its plain language reveals, 3 U.S.C. § 5 does not contain any "mandate" or legal prohibition; it does not "require" anyone to do anything. Instead, it purports to set out a rule by which the Houses of Congress shall determine which electors for President of the United States from a particular State will be entitled to have their votes counted if more than one return purporting to contain the electoral votes of that State is received by the President of the Senate. Tellingly, the State's own legislature, appearing as an *amicus* before this Court, has rejected petitioner's reading of Section 5.

The statute provides that "if" certain rules are followed by a State in making its "final determination of any controversy or contest concerning the appointment of all or any of the electors of such State * * * such determination * * * shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5. The regulation "hereinafter" to which the statute refers is 3 U.S.C. § 15, which announces a rule by which the Houses of Congress will decide which electors' votes to count when the President of the Senate receives "more than one return or paper purporting to be a return from a State." 3 U.S.C. § 15. In such a case, Section 15 provides that "those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been

appointed, if the determination in said section provided for shall have been made." *Id.*

The language of 3 U.S.C. § 5 thus provides a safe harbor for the State's "final determination" of who its electors are, protecting them from subsequent challenge before the Houses of Congress if that final determination is made "by judicial or other methods or procedures" "provided[] by laws enacted prior to" election day. 3 U.S.C. § 5. It does not *require* the States to follow any procedure with respect to determining who its electors are, nor does it prohibit any such procedure. But it does contemplate the exact course of events followed here – a law set before election day, and the resolution of those disputes occurring after election day through "judicial" "methods" under that law.

The legislative history of 3 U.S.C. § 5 confirms this understanding. That history establishes conclusively that the statute's only purpose and effect is to provide the States with a way to guarantee that a State's electors will not be subject to challenge in Congress at the time the electors' votes are tabulated pursuant to the Twelfth Amendment.

Both Sections 5 and 15 of Title 3 were a direct reaction to the Hayes-Tilden debacle of 1877 in which multiple sets of presidential electors from Florida, Louisiana, and South Carolina claimed legitimacy and sought to have Congress count their votes. Given that the electoral college tally was exceedingly close (Samuel Tilden needed only a single electoral vote to prevail), the choice would determine the outcome of the election. But federal law at that time did not specify how such conflicting claims should be resolved, a circumstance that raised the realistic prospect of renewed civil war. The matter was referred to a commission that included five Justices of this Court and was ultimately resolved through a compromise in which Democrats acquiesced in the counting of votes in favor of Hayes in exchange for a promise that federal troops supporting

Republican governments in South Carolina and Louisiana would be withdrawn, allowing Democratic governments to be seated, and effectively ending Reconstruction.[14]

Congress debated for more than a decade how to avoid a reprise of the Hayes-Tilden incident. The solution adopted, as contemporary commentators recognized, was to permit the States themselves to adopt procedures that would ensure that their electors were properly identified. Thus, under Section 5 as enacted, "Congress does *not* command the states to provide for a determination of the controversies or contests that may arise concerning the appointment of the electors, does not even declare it to be the duty of the states to do so, but *simply holds out an inducement for them so to act*." John W. Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633, 635 (1888) (emphasis added); see also Haworth, *supra*, at 305-06 (law "provides that a state may finally determine every contest connected with the choice of electors, but that such determination must be made in accordance with a law passed before the electors are chosen and that the decision must have been made at least six days before the meeting of the electors. Where such a determination has been made, it must be accepted * * * ."). The legislative history specifically reflects a recognition that a State was free not to take advantage of Section 5's safe harbor, with the only implication being that the State's electors would be subject to challenge in the Congress. According to the Senate Report on the

[14] Congress recognized that, because a similar conflict over electors could "affect peace or war, the existence of the United States, the election of a President," 17 CONG. REC. 1023 (Feb. 1, 1886) (statement of Sen. Sherman), it was essential to take "this question out of the political cauldron." 15 CONG. REC. 5079 (June 12, 1884) (statement of Rep. Browne). See generally Paul L. Haworth, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876 (1906); Keith I. Polakoff, THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION (1973); C. Vann Woodward, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951).

bill published in the Congressional Record:

> In those States where a tribunal has been established, under the laws thereof, for the determination of contests concerning the appointment of electors therein, and such tribunal has decided what electors were duly appointed, the determination of the State tribunal shall be conclusive. * * * Congress having provided by this bill that the State tribunals may determine what votes are legal coming from that State, and that the two Houses shall be bound by this determination, *it will be that State's own fault if the matter is left in doubt*.

18 CONG. REC. 30 (Dec. 7, 1886) (emphasis added) (report by Select Committee on the Election of President and Vice-President, accompanying Senate Bill 9).[15]

Indeed, supporters of the bill took great care to address and refute without contradiction precisely the construction of Section 5 that petitioner now erroneously presses 110 years later. These supporters explained that the statute could not result in the invalidation of a State's votes but provided only a safe harbor against a challenge in Congress to the State's slate of electors. As Representative Herbert explained:

> [T]he Senate bill does not undertake to interfere in any manner whatever * * * with the right of a State absolutely to

[15] See also, *e.g.*, 17 CONG. REC. 867 (Jan. 25, 1886) (statement of Sen. Morgan) ("If the States will not dutifully exercise their own powers, so that their rights can not be abridged, they can not justly complain if the two Houses, [having] met to count their votes, are unable to agree as which of two sets of electors are the rightful representatives of the electoral powers of such States. If the vote is lost in such cases, the fault is wholly with the State."); *id.* at 1023 (Feb. 1, 1886) (statement of Sen. Hoar) ("The bill says, therefore, that in case the State declines to appoint any other tribunal and chooses to leave it on the governor's certificate, we will leave it where the State has left it.").

> choose its electors * * * . The Senate bill does not interfere with the election at all nor with the right of election. It simply undertakes to lay down a mode in which it shall be ascertained who has been chosen. That is all. It undertakes simply to legislate with reference to *the rules of evidence by which it shall be ascertained what the State has done, what electors the State has appointed*. * * * [T]he power of the voters is absolute to choose whom they please, but this absolute power of election is not at all inconsistent with the right resting here to decide who has been chosen. *You must separate between the right to choose and the right to decide who has been chosen*.

15 CONG. REC. 5547 (June 24, 1884) (emphasis added). And Representative Eden made virtually the identical point:

> The States are entirely free under the Constitution to adopt the mode of appointment of electors that the legislatures thereof may prescribe. This bill only provides that if the States shall have settled all controversies relative to the appointment of electors, within a given time before the meeting of the electors and by a tribunal of its own selection, the votes of the electors thus appointed and regularly given shall be counted. If any State neglects to use the means within its power to identify who are its legally appointed electors, the two Houses of Congress, when in joint meeting to count the electoral vote, are to resort to other provisions of the bill to determine who are the legally appointed electors of the State. *The bill contemplates no exclusion of electoral votes from the count because of the failure of a State to settle disputes as to the lawful vote of the State*.

18 CONG. REC. 75 (Dec. 9, 1886) (emphasis added).[16] There is no

[16] See also, *e.g.*, 17 CONG. REC. 1060-61 (Feb. 2, 1886) (statement of Sen. Teller) ("But there may be, and possibly will be, times when it may be necessary to

question that Congress fully understood and embraced this understanding of Section 5. Burgess, *supra*, at 637 ("The majority of the House was however finally made to comprehend that this provision was no interference by Congress with the right of the states to appoint their electors in such manner as they might determine, but was only a notice to the states as to what evidence Congress would accept from a state as *conclusive* in case a contest should arise in that body concerning the counting of the electoral vote of a state." (emphasis in original)).[17]

Petitioner's contrary rendition of the legislative history, see Pet. at 12-13 and Pet. Rep. at 2, rests on a total misreading of a statement by one member of the House. In the remarks quoted by petitioner, Representative Cooper merely addressed opponents' "object[ion] * * * to the phrase 'enacted prior to the day,'" asserting that it was essential that the state "legislature [not] be permitted to meet concurrently with the contesting electors and provide a method of deciding the contest at the time the contest is proceeding." 18 CONG. REC. 47 (Dec. 8, 1886). But Representative Cooper never suggested that the statute would, as petitioner supposes, invalidate the selection of electors made under law enacted after the date of the election, or permit this Court to strike down whatever state action had allegedly taken the state outside the statute's safe harbor. To the contrary, he explained that the bill merely addressed Congress's determination of a State's electors and, indeed, flatly *rejected* the claim that Section 5 could result in the invalidation of a State's votes:

determine what the State has settled, or rather, to put it more properly, to determine which is the State, whether it is the people who come here represented by one man as governor or another, when there is a dual State government. It is then, and then only, * * * that there can be any inquiry at all * * * .").

[17] See also, *e.g.*, 17 CONG. REC. 1020 (Feb. 1, 1886) (statement of Sen. Hoar) ("As far as possible this bill remands everything to the State, and simply gives a decisive weight and power to certain official action of the State itself * * * .").

> [N]obody claims that the Senate and the House have the right to say that the vote of any State shall be rejected. But they have a right, and as I understand the matter, it is their duty, to ascertain whether a State has voted or not, and ascertain whether the vote that has been deposited under the forms of law, with the proper officer, is in fact the lawful vote of a State. It is, as has been already said, a question of identity, and these two assembled bodies, the Senate and the House of Representatives, have the right, and have the duty imposed upon them, to see to it that the votes counted are in fact the votes of the States.

Id. at 48.[18]

B. ANY READING OF SECTION 5 AS A MANDATE TO THE STATES WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS UNDER ARTICLE II AND SETTLED PRINCIPLES OF FEDERALISM THAT ARE PROPERLY AVOIDED BY READING IT AS A SAFE HARBOR.

If there remains any ambiguity about the appropriate reading of Section 5, it should nonetheless be interpreted as only a safe harbor in order to avoid the serious constitutional questions that would be raised by reading it as a mandate to the States as petitioner urges. First, such a reading would raise serious constitutional questions under Article II. Article II delegates to the state legislatures the

[18] As those who adopted it recognized, if 3 U.S.C. § 5 *did* purport to bind the States as petitioner suggests, it would run afoul of Article II, which vests the States, and not the federal government, with exclusive authority to determine the "Manner" in which the Electors of a State shall be appointed. U.S. Const. art. II, § 1, cl. 2. Properly construed, Section 5 does not abridge that provision because its framers took care to ensure that, although it might create an incentive for a State to adopt a particular system for deciding who its lawful electors were to be, the provision does not impose *any* requirements upon the States.

determination of the "manner" by which the State shall appoint presidential electors. Article II reserves no power to the Congress to override the States' determination of the manner of appointment of electors, providing only for its determination of the time on which they are chosen and a uniform day on which they shall vote. This stands in pointed contrast to Article I, Section 4, which delegates authority in the first instance to the state legislatures to determine the time, place and manner of congressional elections, but expressly reserves to Congress the power to "make or alter" such regulations.

Even if Congress has, by virtue of Article II and the Necessary and Proper Clause of Article I, Section 8, cl.18, the power to prescribe rules for its own determination of how to "count" the votes of the electors, and such power encompasses the power to enact 3 U.S.C. § 5, Congress would arguably exceed its powers if it were to make any law respecting any State's own determination of the manner of selecting its own electors. The framers' express omission from Article II of any congressional override power comparable to that provided for in Article I plainly suggests, by negative implication, that Congress lacks any such power. Where the framers wished Congress to have the power to override the States as to election methods in federal elections, they explicitly provided it. Omission of such a power from Article II suggests none was intended. Reading Section 5 of Title 3 as a safe harbor rather than a mandate avoids the serious question of whether that section exceeds Congress's delegated authority.

Second, petitioner's reading of Section 5 as preempting a State's own choice of procedures for selecting electors raises serious constitutional questions under settled principles of federalism. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). A congressional attempt to rearrange the constitutional structure of state government – for example, by purporting to preclude judicial

involvement in state election disputes that the state has sought through its own constitution and laws to provide – is one of the few sorts of intrusion upon state sovereignty that might well be unconstitutional even after this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, (1985). See *id.* at 556 (citing *Coyle* v. *Oklahoma*, 221 U.S. 559 (1911) (invalidating a congressional attempt to relocate a state capital)).

Construing Section 5 to permit but not require States to avail themselves of its safe harbor avoids any such intrusion upon the State's own internal allocation of power and hence upon its fundamental attributes of sovereignty. At a minimum, this Court has required congressional intent to be quite clear before it may upset the usual constitutional balance of federal and state powers. See *id.*; *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985); *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 99 (1984). Section 5 does not set forth a mandate with such clarity and accordingly should be construed in the manner most favorable to the preservation of Florida's right to structure its own internal separation of powers as it sees fit – namely, as a safe harbor that allows but does not require any state to conform to the procedures set forth in Section 5.

C. A DETERMINATION BY THIS COURT THAT THE DECISION BELOW DID NOT "COMPLY" WITH THE PROVISIONS OF SECTION 5 THUS CANNOT LEAD TO A JUDGMENT OF REVERSAL

A determination by this Court that the decision of the Florida Supreme Court did not "comply" with 3 U.S.C. § 5 would not support a reversal of the judgment below. Because the statute does not require the States to do anything, a failure to meet the standard set out in the statute is not a ground for reversal. At most, the consequence of such a determination by this Court would be to render the safe-harbor provision inapplicable, so that Florida's

selection of electors might not be "conclusive" in the event of a dispute before Congress about its Electors pursuant to 3 U.S.C. § 15.[19]

III. THE FLORIDA SUPREME COURT DECISION SATISFIES THE CONDITIONS OF THE "SAFE HARBOR" PROVISION OF SECTION 5

In any event, the Florida Supreme Court decision was fully consistent with the safe harbor provision set out in 3 U.S.C. § 5. The statute provides that each state's procedures for settling "any controversy or contest concerning the appointment of all or any of the electors" shall be conclusive with respect to the choice of that state's electors if the state procedures were "provided[] by laws enacted prior to the day fixed for the appointment of the electors." Petitioner argues that the decision of the Florida Supreme Court contravened this requirement by creating a "new legal rule[]" that would apply "retroactively." Pet. at 13-17.

To begin with, petitioner's argument is based on a flat misstatement of the requirements of the statute's safe harbor provision. Petitioner reads the statute as if its text provided that all the substantive rules of decision by which a State makes its "final determination of any controversy or contest" must be set out in "laws enacted prior to the day fixed for the appointment of the electors." But no such language appears in the statute. Rather, the statute specifies that a safe harbor shall be given determinations that are made "by judicial or other methods or procedures" "provided[] by laws enacted prior to" election day. 3 U.S.C. § 5.

[19] Even a determination now by this Court that the Florida Supreme Court decision was not in compliance with Section 5 would not necessarily take Florida out of the safe harbor since subsequent developments such as the contest actions now pending in Leon County could result in changes to ultimate vote totals regardless of the Florida Supreme Court's decision.

Florida has complied with this standard. The institutional mechanism of judicial review to decide disputes about electors was in place in Florida long before the day fixed for the appointment of electors. See Fla. Const. art. V, § 1 ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts."); *id.* art. V, § 20(c)(3) (granting circuit courts original jurisdiction "in all cases in equity" and reaffirming the Supreme Court's pre-existing jurisdiction). If the text of the statute left any doubt, it is clear from the legislative history, beyond any second-guessing, that the Florida system comports with congressional intent:

> It means precisely this: The State may by statute enacted before the day of election fix any tribunal that within its judgment it may be deemed necessary to decide any controversy concerning the appointment of the electors, or any one of them; and when that tribunal, whatever it may be, shall have settled that question within a certain period before the meeting of the electors, that result is final and conclusive upon Congress, and the electors decided by that tribunal to be legally appointed must be counted by the House and the Senate. That is what it means.

15 CONG. REC. 5461 (June 21, 1884) (statement of Rep. Springer). "Tribunals are established in the States for trying such cases, and the only effect of this is that their decision is binding upon Congress." *Id.* (statement of Rep. Hiscock). "The bill provides that where the State has created a tribunal for the determination of these questions the proceedings of that tribunal shall be conclusive * * * ." 17 CONG. REC. 1020 (Feb. 1, 1886) (statement of Sen. Hoar).

The legislative history nowhere suggests that, if States vested the judiciary with jurisdiction over election contests (which Congress believed would be the most likely course), the safe harbor would apply only if the courts issued decisions unambiguously on all fours with pre-election precedent. To the contrary, it was understood that

election contests would "be decided according to the laws of each State by judicial interpretation." 17 CONG. REC. 816 (Jan. 21, 1886) (statement of Sen. Sherman). So long as the State has "submitted the controversy to its judicial tribunals, and they have determined it, that is the act of the State, and it ought to bind the Congress * * * ." 15 CONG. REC. 5078 (June 12, 1884) (statement of Rep. Browne). No more was expected than that the matter would be resolved "by the judicial tribunals appointed to try judicial contests in a judicial way." 17 CONG. REC. 1064 (Feb. 2, 1886) (statement of Sen. Edmunds); see also 15 CONG. REC. 5462 (June 21, 1884) (statement of Rep. Springer) (explaining that, under Section 5, "this tribunal must have been in existence before[]" the election).

Even if 3 U.S.C. § 5 had anything to say about the substantive rules under which ballots in Florida are counted – which, by its terms, it does not – it is clear that, after the Florida Supreme Court's decision under review, as before, those ballots are being counted under "laws enacted prior to the day fixed for the appointment of the electors." 3 U.S.C. § 5. That decision was a routine state court adjudication interpreting state law. And, of course, the wildly creative "construction" of 3 U.S.C. § 5 that petitioner urges on this Court as a means of reversing the decision below dwarfs any "judicial departure from the well-established law of Florida" by the state supreme court below. Contra Pet. at 15.

IV. NEITHER FLORIDA'S SYSTEM FOR APPOINTING ELECTORS, NOR THE FLORIDA SUPREME COURT DECISION CONSTRUING THAT SYSTEM, VIOLATES ARTICLE II

Petitioner next argues that the procedure Florida is now employing to appoint its electors "contraven[es]" Article II of the Constitution because of the role played in that procedure by the Florida Supreme Court. See Pet. Rep. at 7; Pet. at 18-20. At the outset, we note that this claim may not be properly before the Court

because it was neither pressed nor passed upon below. See *Yee* v. *Escondido*, 503 U.S. 519, 533 (1993). This is an appeal from a state court judgment, under 28 U.S.C. § 1257. See Pet. 1. That statutory authority prevents this Court from deciding federal constitutional claims that are raised for the first time before it in appeals from state court decisions. See *Adams* v. *Robertson*, 520 U.S. 83, 88 (1997) (per curiam); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-439 (1969). Before a claim will be considered here on appeal, it must "'be brought to the attention of the state court with fair precision and in due time.'" *Street* v. *New York*, 394 U.S. 576, 584 (1969) (quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928)).[20] That standard was not met here.[21]

In any event, Article II's command is directed to the States *qua*

[20] There does appear to be an exception to the "pressed or passed on" rule when the constitutional question which petitioner seeks to present first "arose from [the state court's] unanticipated act in giving to the statute a new construction which threatened rights under the Constitution," at least when the constitutional question is subsequently presented to the state court in a petition for rehearing or reargument. See *Herndon* v. *Georgia*, 295 U.S. 441, 443-444 (1935). Even if the requirement of filing a petition for reargument or rehearing in the state court could be waived, petitioner cannot invoke this exception since the ruling of the state court could not have been "unanticipated." The Florida Supreme Court ruled essentially as petitioner asked them to. (Indeed, the court below gave respondents somewhat less than they asked for by setting a rigid November 26 deadline for completion of the manual recounts.) And petitioner *did* anticipate the ruling, arguing that it would violate 3 U.S.C. § 5. What he failed to do was to raise a claim under Article II, and it is for that reason that he is now foreclosed from raising any such claim before this Court.

[21] An examination of the brief filed by petitioner below reveals that no Article II claim was adequately made before the Florida Supreme Court. The only reference to Article II in the portion of petitioner's brief in that Court on which he relies was in a description in a footnote of the source of state authority to prescribe the manner by which electors are chosen. See Brief of George W. Bush in *Palm Beach County* v. *Katherine Harris*, at 43 n.15; Pet. App. at 62a-63a. The only argument made in that footnote was that "under the relevant federal statutes and the Supremacy Clause" the state procedures for choosing electors is "incorporate[d] by reference" into federal law. See *id*.

States and cannot become a warrant for federal court intrusions into state election disputes, much less for federal judicial supervision of state court decisions regarding those disputes. Here, it is clear that the requirements of Article II, § 1, cl. 2 have been satisfied, for the Florida legislature did "direct" (in the Florida Election Code) a "Manner" for the appointment of electors. Under Florida law, this "Manner" of appointment happens to be subject to review by the state's highest court. And the Florida Supreme Court acted well within its statutory jurisdiction in this case. Article II, § 1, cl. 2 neither displaces the state judiciary nor forbids it from performing its traditional function under state law of construing statutes to fill gaps, clarify ambiguities and harmonize inconsistencies. Indeed, 3 U.S.C. § 5 provides strong evidence that Congress itself recognized the propriety of state judicial review regarding the appointment of electors. For Section 5 offers a safe harbor to states that use "*judicial* or other methods or procedures" to resolve controversies concerning electors.

Petitioner concedes that, under Article II, § 1, cl. 2, "[h]ad the Florida legislature seen fit to vest the decision in the hands of the judiciary, presumably it could have done so." Pet. at 20. But if the state judiciary could have been delegated the task of selecting the electors by name, then surely it may engage in the much less intrusive, and more familiar, role of garden variety statutory interpretation. In the end, petitioner seems ultimately to agree that state courts should play some interpretive role. See Pet. Rep. at 7 (conceding a role for the state judiciary in the interpretation of laws for the appointment of presidential electors).

Although petitioner insists that "[w]here a State's judiciary * * * eviscerat[es] a state statutory rule applicable to electoral disputes, federal court review is plainly appropriate," *id.*, the decision below did not "eviscerate" the state statutes it construed. It interpreted and harmonized them, making sense of the entire statutory scheme. More fundamentally, as this Court has repeatedly held, a grant of

lawmaking power to the "legislature" of a State imposes no requirement that only the legislature itself make the law. Such a grant does not impose any restriction on the lawmaking machinery employed by the States. State statutes governing the appointment of electors, like those enacted pursuant to other constitutional delegations of lawmaking power to the "legislatures" of the States, have always been subject to state law processes including state judicial review and gubernatorial veto.[22]

Thus, in *Smiley* v. *Holm*, 285 U.S. 355 (1932), this Court held that the delegation to each state's "Legislature" in Article I, § 4 of the authority to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, did not preclude the state executive, the Minnesota Governor, from vetoing a state congressional reapportionment law. Obviously such action – which completely overturned the action of the state legislature – would run afoul of petitioner's "evisceration" principle. This Court held, however, that § 4 does not exclude other branches of the state from participating as they ordinarily do in the lawmaking process of prescribing the manner of elections. It rejected the argument put forward by petitioner that, in passing laws pursuant to the constitutional grant of authority in Art. I, § 4, the legislature is "not acting strictly in the exercise of a lawmaking power but merely as an agency, discharging a particular duty in the manner which the Federal Constitution required." *Smiley,* 285 U.S. at 335.

This Court found in the constitutional language no "attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the state has

[22] Petitioner's reading of Article II would also call into question the Secretary's current practice of giving a ten-day extension for overseas absentee ballots, a practice that rests only on an administrative role. See Fla. Div. of Elections Rule 1S2.013. See note 3, *supra*.

provided that laws shall be enacted. Whether the Governor of the State, through the veto power, shall have a part in the making of state laws is a matter of state policy. Article I, Section 4, of the Federal Constitution, neither requires nor excludes such participation." *Id.* at 368.[23] Nothing in the Article I delegation of lawmaking power to the States "precludes a State from providing that legislative action in districting the State for congressional elections shall be subject to the veto power of the Governor." *Id.* at 372. Similarly, nothing in Article II prevents the State from having its judiciary play its ordinary role in the lawmaking process, that of interpreting the laws enacted by the legislature.[24]

[23] Similarly, in *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), this Court considered whether citizens could reject via popular referendum a law enacted by the state legislature to regulate elections. The Ohio constitution granted the people the right to overturn any legislation in a referendum; the people exercised that power to overturn a congressional apportionment scheme. The Court ruled that Article I, § 4 did not preclude this referendum. The Court held that, in order to show that this clause was violated, the petitioners would have to demonstrate that the Republican Guarantee Clause was also violated, that is, that the inclusion of a referendum as a check on the legislature's authority would "introduce a virus which destroys that power, which in effect annihilates representative government and causes a State where such condition exists to be not republican in form." *Id.* at 569. In *Davis*, as here, no such argument could be made.

[24] Petitioner has cited a single sentence in *McPherson* v. *Blacker,* 146 U.S. 1, 25 (1892), which states that the words of Article II operate "as a limitation upon the state in respect of any attempt to circumscribe the legislative power." We do not disagree. If the state supreme court or Governor decided to pick electors on its own, in disregard of state law, that would violate the Constitution. But where, as here, the state supreme court is simply interpreting existing law, such action is clearly constitutional. See *id.* at 23 ("We are not authorized to revise the conclusions of the state court on these matters"); *id.*, at 35 (quoting Senate Report permitting state supreme court to appoint electors if legislature so wishes). Indeed, in *McPherson* itself, the state Supreme Court below had measured the statute providing for the appointment of electors for conformity with "the state constitution and laws," and this Court concluded that it was "not authorized to revise the conclusions of the state court on these matters of local law." *Id.* at 23. This very conclusion is enough to dispose of petitioner's Article II claim.

Only this principle can explain this Court's recent decision in *Growe* v. *Emison*, 507 U.S. 25, 34 (1993), in which, despite the reference to "Legislature[s]" in Article I, § 4, cl. 1, this Court unanimously held that state courts as well as state legislatures could redraw congressional districts. This Court criticized the district court's "mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts," thus "ignoring the possibility and legitimacy of state judicial redistricting." *Id.* at 34.[25] This Court reaffirmed *Scott* v. *Germano*, 381 U.S. 407, 409 (1965) (per curiam) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.").[26]

Smiley and related cases construing constitutional language identical in relevant part to that relied upon by petitioner here foreclose his argument under Article II. Indeed, the case for subjecting election laws to judicial interpretation at the state level is markedly stronger than the case for subjecting them to a state law executive veto mechanism. *Smiley* observed that, although the veto mechanism existed in "only two states" at the time of the Founding, it was nonetheless sufficiently "well known" to have informed the

[25] The source of state court redistricting authority is the "Manner" clause of Article I, § 4, cl. 1, which refers to state "Legislature[s]." See Brief of Appellants Joan Growe, Secretary of the State of Minnesota, et al., in *Growe* v. *Emison*, No. 91-1420, 1991 U.S. Lexis Briefs 1420, at n.15 ("The United States Constitution gives responsibility for drawing congressional district boundaries to state legislatures. U.S. Const. art. I, § 4. When a state legislature fails to adopt a congressional redistricting plan, state courts are urged, under the doctrine established in *Scott v. Germano*, to adopt a plan. Numerous state courts have met this responsibility * * * .").

[26] Although the Florida legislature might have reserved to itself the power to select electors, it decided to treat Presidential elections as part of its general framework for all other elections. This framework implicates judicial review, executive decisionmaking, and conformity to Florida's constitutional principle of voter sovereignty.

drafting of the constitutional provisions empowering state legislatures to enact laws on the election of federal officials. 285 U.S. at 368. In contrast to the veto mechanism, judicial power to interpret statutes was routine in all of the original states. As Alexander Hamilton explained in the Federalist Papers – and Chief Justice Marshall repeated in *Marbury* v. *Madison* – "interpretation of laws is the proper and peculiar province of the courts."[27]

Thus, state judicial power to interpret state election laws has been an established practice in the centuries since the Founding.[28]

[27] THE FEDERALIST NO. 78 (Alexander Hamilton); see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 12 (1983).

[28] See, *e.g.*, *In re Opinion of the Justices*, 107 A. 705, 707-08 (Maine 1919) (construing women's suffrage legislation in conjunction with state referenda and also stating "The clause, 'in such manner as the Legislature thereof may direct,' means, simply that the state shall give expression to its will, as it must, of necessity, through its lawmaking body, the Legislature.* * * . But these acts and resolves must be passed and become effective in accordance with and in subjection to the Constitution of the state, like all other acts and resolves having the force of law. The Legislature was not given in this respect any superiority over or independence from the organic law of the state in force at the time when a given law is passed. * * * . [Legislative acts under Section 4] must always be subject to the provisions of the Constitution of the state in force at the time such acts are passed and can be valid and effective only when enacted in compliance therewith."); *State* v. *Marsh*, 34 N.W.2d 279, 282-83 (Neb. 1948) (resolving this question: "The question then is--what manner of appointment of electors has the Legislature of this state directed?" and deciding between conflicting state statutes about "political parties" by interpreting these various laws); *Markham* v. *Bennion*, 252 P.2d 539, 540-44 (Utah 1953) (interpreting phrase "public officers" in Utah election law governing presidential elections through canons of construction and judicial examination of the "intent of legislature" in enacting law); *State* v. *Myers*, 4 N.E.2d 397, 398-99 (Ohio 1936) (interpreting registration provisions of Ohio Election Code and stating that Code is "not unconstitutional" because "there is no provision in the Ohio Constitution limiting the exercise of that delegated power" under Article II to select the manner of appointing Electors); *McClendoon* v. *Slater*, 554 P.2d 774, 778-81 (Okla. 1976) (interpreting Oklahoma election law, such as provisions governing independent voters, recognition of parties, and party affiliation changes); *Commonwealth* v. *O'Connell*, 181 S.W.2d 691 (Ky. Ct. App. 1944) (construing

Petitioner's understanding of Article II would place federal courts in the business of selecting which, if any, of these state court decisions are permissible.[29]

Moreover, petitioner's claim that the Florida Supreme Court may not interpret state electoral statutes calls into question not only that

state law governing absentee ballots in presidential election with state constitution's provisions); *McLavy* v. *Martin*, 167 So. 2d 215 (La. Ct. App. 1964) (interpreting Louisiana Presidential Elector Law and finding that it is not an unconstitutional delegation of power to a political party); *Opinion of the Justices*, 34 So. 2d 598 (Ala. 1948) (stating that law that binds electors violates the Constitution); *In re Opinion of the Justices*, 113 A. 293 (N.H. 1921) (interpreting proposed bill governing absentee voters, and finding that bill would be constitutional insofar as it is passed under Article II power); *Opinion of Justices*, 1864, 45 N.H. 595 (1864) (deciding that proposed bill governing absentee voting is constitutional); *Opinion of Justices*, 37 Vt. 665 (1865) (deciding similar issue); *Stanford* v. *Butler*, 181 S.W.2d 269, 271-73 (Tex. 1944) (interpreting phrase "state office" in Texas Election Code and holding that such laws could not apply to Presidential elections because such a reading "was not intended by the Legislature" and stating that because the state legislature has not directed how a party should select its nominees, "the party is free to follow any method which it may choose in keeping with party usages and customs"); *State* v. *Osborne*, 125 P. 884, 885 (Ariz. 1912) (reviewing the constitutionality of an act providing for, among other things, election of Presidential electors and stating that "[t]he constitutionality of an act of the Legislature, although it may determine the legality of holding an election and thereby have a political effect, is strictly a judicial question. For whether the act is within the limits of its delegated power or not is a strictly judicial question to be decided by the courts, and in no sense political" and that judicial review does not "interfere with the discretionary powers of the Legislature").

[29] As the Court explained in *Smiley*:

> General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights, and hence subject to constant and careful scrutiny. Certainly, the terms of the constitutional provision furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the states.

285 U.S. at 369.

court's indisputable power of judicial review, but also the important and established interpretation of such statutes by state Attorneys General nationwide.[30]

[30] See 1989 Alaska Op. Atty. Gen. 85, 1989 WL 266932, July 1, 1989 (interpreting Alaska Election Code regarding write-in votes and Twelfth Amendment after an election); Atty. Gen. Op. No. 81-134, 1981 WL 155208, Feb. 4, 1981 (construing absentee voting statutes); Miss. Atty. Gen. Op., 1980 WL 28870, Oct. 28, 1980 (construing Mississippi absentee ballot provisions and "vacation" exception); Miss. Atty. Gen. Op., 1980 WL 28885, Oct. 27, 1980 (interpreting other provisions of absentee ballot law); 1979-80 Mass. Op. Atty. Gen. 98, 1979 WL 42140, Oct. 29, 1979) (interpreting Massachusetts absentee ballot law); Mich. Op. Atty. Gen., No. 6775, 1993 WL 494593, Nov. 18, 1993 (deciding whether federal and state government employees can serve as Presidential electors under Michigan law); 20 Okl. Op. Atty. Gen. 156, No. 88-68, 1988 WL 424327, Oct. 4, 1988 (deciding same issue for Oklahoma Electors); Tenn. Op. Atty. Gen. No. 80-62, 1980 WL 103680, Feb. 5, 1980 (deciding same issue in Tennessee); S.C. Op. Atty. Gen. 196, 1960 S.C. Op. Atty. Gen. No. 88, 1960 WL 9016, Sept. 21, 1960 (interpreting South Carolina statute to say that Presidential electors are nominated by Party officials, not through a primary); Tenn. Op. Atty. Gen. No. 79-525, 1979 WL 34133, Dec. 11, 1979 (interpreting Tennessee Presidential Elector statutes); Op. S.C. Atty. Gen., 1960 WL 12012, April 22, 1960 (interpreting South Carolina statute regarding names of Presidential electors on ballot); Op. S.C. Atty. Gen., 1981 WL 158040, Nov. 6, 1981 (interpreting South Carolina nomination law for Presidential Electors); Tex. Atty. Gen. Op. JM-998, 1988 WL 406325, Dec. 23, 1988 (interpreting Texas Election Code about straight-line party votes); 1980-81 Va. Op. Atty. Gen., WL 101405, Oct. 22, 1980 (interpreting Virginia Code as not requiring a special provision for write-in votes for president on a voting machine); Op. Mich. Atty. Gen., 1982 WL 183571, June 16, 1982 (interpreting Michigan election law governing political parties on ballots); 69 Md. Op. Atty. Gen. 133, 1984 WL 247042, Jan. 6, 1984 (interpreting similar law in Maryland); Mo. Op. Atty. Gen., Op. No. 179, 1980 WL 115003, Aug. 22, 1980 (interpreting similar law in Missouri); Kan. Op. Atty. Gen. 24, May 18, 1992 (deciding whether one Vice Presidential nomination can be substituted for another under Kansas Election Law); Op. Ky. Atty. Gen., No. 00-1, 2000 WL 121765, Jan. 11, 2000 (interpreting Kentucky election statutes to decide that Reform Party is not a "political party" entitled to use presidential primary); 42 Oreg. Op. Atty. Gen. 93, 1981 WL 152270, Sept. 25, 1981 (interpreting Oregon law governing nomination of Presidential electors); Op. Atty. Gen. Tenn., No. 81-460, 1981 WL 169408, Aug. 18, 1981 (similar issue under Tennessee law); 1988 Ariz. Op. Atty. Gen. 93, No. I88-069, 1988 WL 249646 (June 27, 1988) (stating that an Arizona statute that failed to allow a way for new

The rule set out in *Smiley, Growe*, and the other cases described above, resonates with the fundamental principle that the federal Constitution takes the arrangement of state governmental branches as it finds them. "[T]he concept of the separation of powers embodied in the United States Constitution is not mandatory in state governments." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (1957). Indeed, "[i]t would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight states." *Id.* at 256 (Frankfurter, J., joined by Harlan, J., concurring in the judgment).[31]

Petitioner's argument that the delegation of authority to the state legislatures in Article II works a change in the ordinary process of making state law rests solely on a case construing not a delegation

political parties to place the names of their presidential electors on the ballot was unconstitutional); 1984 Ariz. Op. Atty. Gen. 51, No. I84-059, 1984 WL 61256 (April 20, 1984) (deciding that an Arizona statute did not entitle a particular party to representation as a political party). Petitioner's reading, which would permit the state courts to review all state election law with the sole exception of those governing Presidential elections, would create a baffling array of confusions in state law. State officials tend to examine general provisions of state election law in a uniform way. E.g., Del. Op. Atty. Gen. 00-IB11, 2000 WL 1092964, June 19, 2000 (interpreting Delaware's general statutory language restricting voting rights of "idiots or insane people").

[31] See also *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 480-81 (1981) (Stevens, J., dissenting) ("[T]he allocation of functions within the structure of a state government [is] a matter for the state to determine. I know of nothing in the Federal Constitution that prohibits a State from giving lawmaking power to its courts."); *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612 (1937) (Cardozo, J.) (rejecting argument that lawmaking authority of the legislature had been improperly assigned to another branch: "The Constitution of the United States in the circumstances here exhibited has no voice upon the subject."); *Illinois*, 187 U.S. 71, 84 (1902) (Harlan, J.) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate * * * is for the determination of the State.").

of lawmaking authority to the state legislatures, but the wholly different delegation to the state legislatures of power to ratify constitutional amendments under article V.[32] Petitioner relies on the Court's statement in *Hawke* v. *Smith*, 253 U.S. 221 (1920), that the term "Legislature" in Article V means *only* the legislature (and not the people via a plebiscite). See Pet. at 20 (quoting *Hawke*, 253 U.S. at 227). Yet as *Smiley* explained, *Hawke* is inapposite precisely because it does not involve a delegation of "lawmaking" authority.[33] Indeed, *Hawke* itself makes clear that its holding is confined to those constitutional clauses that impose a non-lawmaking role on state legislatures under the Constitution. *Hawke*, 253 U.S. at 231 ("[L]egislative action [under Article I, § 4] is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution.").[34]

This Court itself has confirmed state court authority to interpret and enforce state election laws passed pursuant to Article II, § 1, cl.

[32] Article V of the Constitution provides for a Constitutional Convention for amendments to be called "on the Application of the Legislatures of two thirds of the several States." It further provides that an amendment will be valid "when ratified by the Legislatures of three fourths of the several states," if Congress chooses this "Mode of Ratification."

[33] *Smiley*, 285 U.S. at 365-66. ("The legislature may act as an electoral body, as in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the Constitution under Article V. Hawke v. Smith, No. 1, supra; Id., No. 2, 253 U.S. 231; Leser v. Garnett, 258 U.S. 130, 137. It may act as a consenting body, as in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17. Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view.")

[34] *Hawke* discussed seven different clauses in which state legislatures are given federal constitutional roles. 253 U.S. at 227-28. In all seven, the legislatures act in nonlawmaking roles. Thaere were two, and only two, exceptions from this list — the Article I, Section 4 power to prescribe the "Manner" of congressional elections, and the Article II power to do the same for presidential elections.

2. More than a century ago the Court held that "Although the electors are appointed and act under and pursuant to the constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the states when acting as electors of representatives in congress." *Fitzgerald* v. *Green,* 134 U.S. 377, 379 (1890) (citations omitted); see *Walker* v. *United States*, 93 F.2d 383, 387-88 (CA8 1937) ("It is contended by defendants that presidential electors are officers of the state and not federal officers. We are of the view that this contention is sound and should be sustained.") (citing *Fitzgerald*). Moreover, because the selection of electors is a matter of *state* law, the Court has explained, state courts have jurisdiction over cases involving violations of state election laws enacted under Article II, § 1. See *Fitzgerald*, 134 U.S. at 378-79; see also *Walker*, 93 F.2d at 388-89 ("Manifestly, the right to vote for presidential electors depends directly and exclusively on state legislation. We conclude that count 1 of the various indictments does not state a federal offense."). The Court in *Fitzgerald* thus refused to reverse a state court judgment imprisoning a state resident for violating state election laws, explaining that the state "clearly has such power in regard to votes for presidential electors, unaffected by anything in the constitution and laws of the United States." *Fitzgerald*, 134 U.S. at 378-79. Accordingly, the state judiciary's traditional role in interpretation does not disappear under Article II, § 1, cl. 2.

V. NOTHING IN THE FLORIDA SUPREME COURT DECISION VIOLATES DUE PROCESS.

Nor, finally, is there any merit to petitioner Bush's glancing contention that the Florida Supreme Court's decision violates his federal right to "due process ." Pet. at 17. Again, this claim was not raised below. The only reference to due process in petitioner's brief in the Supreme Court of Florida came in his discussion (see Pet.

App. at 63a) of the conduct of the manual recounts under the Florida scheme – leading to the question this Court declined to review in No. 00-837. Not having been raised below, the due process claim is not properly before this Court.[35]

Because this claim was raised for the first time in the Petition for Certiorari, and in a single sentence at that, it is hard to determine what theory, if any, petitioner seeks to urge on this Court. The Question Presented emphasizes the "post-election" nature of the decision below, so it appears that petitioner seeks to allege that the Florida Supreme Court's interpretation of state law amounted to a retroactive change in the law so egregious that it violates "substantive due process." See *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 556-557 (1998) (Breyer, J., dissenting) (noting that Due Process Clause might be thought to protect against unfairly retroactive laws because "courts have sometimes suggested [that] a law that is fundamentally unfair because of its retroactivity is a law which is basically arbitrary"); but compare *id*. at 537-538 (plurality opinion of O'Connor, J.) (expressly declining to measure purportedly unfairly retroactive legislation against the substantive due process test for "arbitrar[iness] and irrational[ity]"). The difficulty with this argument is that petitioner cannot establish any of the elements that would be essential to such a claim.

To establish the charge of a constitutionally impermissible retroactive change in the law, petitioner would have to demonstrate not simply that the Florida Supreme Court's decision constituted a retrospective change and that the change deprived him of a cognizable liberty or property interest, but also that the change was "arbitrary and irrational." *Eastern Enters*, 524 U.S. at 548

[35] It may be revealing of the force of petitioner's due process theory that he discusses it in only a single paragraph of the petition for certiorari, Pet. at 17-18, and not at all in the briefing below or in the reply in support of certiorari.

(Kennedy, J., concurring in the judgment and dissenting in part); see also *id.* at 537 (plurality opinion of O'Connor, J.) (same); *id.* at 556 (Breyer, J., dissenting) (same).

First, the Florida Supreme Court's decision did *not* constitute a retroactive change in Florida law at all. For the reasons set forth above in Part I, the court's decision was an unremarkable construction of state statutes and state constitutional provisions. Even if that were not the case, it would take an exceptional showing of unfair retroactive effect to hold a court decision (as opposed to a legislative enactment) violative of due process: court judgments are normally retrospective in light of their application to the parties to the case, and the Fourteenth Amendment has never been suggested to require otherwise. Indeed, this Court's decisions reflect the strong presumption, consistent with this Court's understanding of the nature of the judicial act, that judicial rulings (again, in contrast to legislative enactments) must be retrospectively applied to the parties themselves. See, *e.g.*, *Harper* v. *Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993); see *id.* at 107-08 (Scalia, J., concurring)..

Second, the supposedly retroactive nature of the Florida Supreme Court's decision did not deprive petitioner of any cognizable interest protected by the Fourteenth Amendment. There can be no reliance interest in an administrative deadline that the Florida Supreme Court held to be inconsistent with Florida law and the need to count Florida votes in a fair and accurate manner. The most that petitioner has said on the point is that "the candidates' decisions whether to seek a manual recount in specific additional counties might well have been affected had petitioner and other candidates known" of the court's decision in advance. Pet. at 18. That argument is both fanciful and disingenuous. Petitioner has never asserted that he failed to request recounts on the view that they could not be completed within the deadlines set by the Florida Secretary of State. To the contrary, he has repeatedly rejected the suggestion that

he desired such recounts, and specifically did so in response to a direct inquiry from the Florida Supreme Court. See Pet. App. 38a n.56. Moreover, even assuming that petitioner has a protected constitutional interest in seeking recounts in other counties, Florida's election protest provisions (which petitioner has invoked with respect to several Florida counties) are certainly sufficient to protect that interest. See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).[36]

Petitioner also suggests that, if the candidates had known that the Florida Supreme Court would permit supplemental returns to be filed after the deadline, "campaign strategies would have taken this into account," Pet. at 18 (internal quotation marks and citation omitted), but that just demonstrates the extreme weakness of his due process claim. Petitioner obviously can point to no strategic or tactical

[36] The only decision cited by petitioner in support of his supposed interest is inapposite. *Roe* v. *Alabama*, 43 F.3d 574 (per curiam), and 68 F.3d 404 (CA11 1995) (per curiam), involved the claim of Alabama *voters* that the effectiveness of their votes would be diluted by the retroactive abrogation of a uniform, long-standing prohibition on accepting certain write-in ballots. Not only does petitioner lack standing to raise such a claim, but the Eleventh Circuit's holding rested on the fact that the change in Alabama law resulted in the counting of selected ballots that previously had been regarded as *illegal* in circumstances where voters who were *not* given the benefit of the new rule of eligibility could plausibly allege that they would have decided to vote had the onerous requirements lifted for others been lifted for them as well. Petitioner asserts here the very different interest in precluding the counting of entirely *lawful* ballots that happen not to have been counted prior to the deadline set by the Secretary of State, an interest that cannot possibly have constitutional footing.

The only due process right even arguably implicated by this case is the right of voters to have their ballots counted, a consideration that only supports the state supreme court's decision. The state has no substantial interest in enforcing an arbitrary deadline that has the singular effect of precluding those votes from being counted. See *Zimmerman Brush*, 455 U.S. at 428. It is worth noting in this respect that petitioner Bush himself is aggressively arguing in the state courts that military absentee votes should be counted notwithstanding various clear requirements of Florida statutes to the contrary, based in substantial part on the rights of voters to have their ballots counted.

decision made during the presidential campaign in reliance on Florida's specific deadline for its counties' submission of their completed election returns, on the scope of the Secretary of State's discretion with respect to that deadline, or on what counts as evidence that a voter intended to poke a hole through a machine-readable ballot!

Finally, there is no serious argument that the Florida Supreme Court's decision, even if retroactive, was unconstitutionally "arbitrary or irrational." Unlike a case such as *Eastern Enterprises*, in which particular companies were isolated by Congress to bear retroactively an enormous and unexpected financial burden arguably beyond any reasonable expectation, the Florida Supreme Court's decision applies entirely evenhandedly to all counties and candidates.[37] Moreover, not even petitioner Bush challenges the principal undercurrents supporting the state supreme court's decision: the state constitutional right to have one's vote counted and the virtue of reconciling competing statutory provisions.

At bottom, all petitioner can really claim is that, in his view, the Florida Supreme Court got Florida law wrong. But a "'mere error of state law' is not a denial of due process." *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982); *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948) ("otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question"); *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 680 (1930) (Brandeis, J.) ("[T]he mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or

[37] Although only three counties were at the time seeking to conduct manual recounts, that was only because petitioner Bush elected not to exercise his right to request recounts in any of the sixty-four other Florida counties.

otherwise confer appellate jurisdiction on this Court"). To hold that the decision below violates due process would do violence both to principles of federalism and to the independence of the judiciary throughout the United States. It would invite an onslaught of such claims by the losing parties in state courts alleging that the decisions in their cases constituted an unconstitutional departure from "preexisting * * * law." Pet i. It would effectively introduce a federal rule of separation of powers on the states, by holding that certain legal rules – those that would comprise such unlawful departures – may not be announced by courts, but only through legislation. And it would undermine the authority of the judiciary to decide the meaning of law, by holding that apparently routine judicial acts of statutory construction long thought to involve only questions of state law in fact amount to illegitimate and unconstitutional usurpations of the legislative role.

Undoubtedly the Due Process Clause imposes some limit on truly outrageous and arbitrary judicial action, "the most egregious of circumstances." *Eastern Enterprises*, 524 U.S. at 550 (Kennedy, J., concurring). But if the balance between state and federal power is to be held true, and if the judicial process of statutory interpretation is to be protected from promiscuous charges of usurpation, before a claimed error in a construction of state law can rise to the level of a due process violation it would have to be far graver than any that petitioner has erroneously attributed to the court below.

CONCLUSION

The judgment should be affirmed.

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November 28, 2000
Fla. Sec. of State Katherine Harris Brief for December 1, 2000 United States Supreme Court Hearing to Review Florida Supreme Court Ruling

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *ET AL.*,

Respondents.

Brief on the Merits of Respondents Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission

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INTRODUCTION

Respondents the Florida Secretary of State and the Florida Elections Canvassing Commission are charged with administering Florida's election laws. This brief focuses primarily on explaining the legal and practical effects of the Supreme Court of Florida's November 21, 2000 decision in *Palm Beach Canvassing Board v. Katherine Harris, et al.*, Case Nos. SC 00-2346, SC 00-2347, and SC 00-2348 (Fla. filed Nov. 21, 2000) on Florida's election law and its application to the November 7, 2000, general election of Presidential and Vice-Presidential Electors. We respectfully submit that the Supreme Court of Florida's decision, while establishing the future rights and procedures under Florida law, deviated from the law of the state as it existed on the day the Presidential Electors were to be elected by the people of Florida, November 7, 2000, in at least five important respects. We also address the question posed by this Court to the parties: "What are the consequences of this Court finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?"

SUMMARY OF THE ARGUMENT

The decision of the Supreme Court of Florida changed Florida law in several important respects. *First*, the decision significantly rewrote the deadlines for county canvassing boards to certify election returns to the state. While the Florida legislature created a strict deadline, the court supplanted this with a loose standard that merely requires certification to allow sufficient time for an election contest to be completed by the federal deadline for appointment of Presidential Electors. In applying this new standard, the court also created a specific deadline of November 26 that applies solely in this election. *Second*, the decision allows county canvassing boards to amend timely-filed returns after the statutory deadline for certification of election results has passed, despite absence of statutory authority for such an amendment. *Third*, in light of the elimination of the deadline for county certifications and the new plenary amendment rights, the decision precludes the Florida Elections Canvassing Commission from performing its statutory duty to certify election results within the statutory time frame. Instead, the Commission must now wait for any protracted recounts to be completed and amendments to be filed before performing this function.

Fourth, the decision significantly broadened the power of county canvassing boards to conduct manual recounts. Under prior interpretations of Florida law, such recounts were used only to remedy a failure in the system of automated vote tabulation. Now, they may be used at any time, for any purpose, at the unfettered discretion of local officials. *Finally*, in conjunction with this new recount power, the decision below grants county canvassing boards newfound powers to set standards for evaluating ambiguous ballots. Because manual recounts were never meant to be used as broadly as is now allowed, the Florida Legislature, unlike those of other states that have enacted broad manual recount rights, never created standards by which to judge ambiguous, improperly executed machine tabulation ballots. The broad recount rights created by the court leave this gap to be filled by local officials on an *ad hoc* basis.

STATEMENT OF THE CASE

I. THE DUTIES OF FLORIDA OFFICIALS AND AGENCIES WITH REGARD TO ELECTIONS

The Florida state officers and executive agencies before the Court are the Secretary of State ("Secretary"), the Division of Elections ("Division"), the Florida Elections Canvassing Commission ("Commission"), and the Attorney General (the "Attorney General"). The powers and duties of each officer are summarized below.

A. The Secretary

The Secretary is an independently elected constitutional officer and a member of Florida's executive cabinet. Fla. Const. art. IV, § 4. The Florida Constitution provides that each cabinet member "shall exercise such powers and perform such duties as may be prescribed by law." *Id.* The Secretary is the state's chief elections officer. Fla. Stat. §§ 15.13 and 97.012 (2000). As such, the legislature has vested the Secretary with the authority to administer and oversee all elections in the state, and requires the Secretary to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." *Id.* § 97.012(1) (2000).

B. The Commission

The Commission is a special purpose state agency composed of the Governor, the Secretary, and the Director of the Division of Elections.[1] Fla. Stat. § 102.111 (2000).

The Commission's purpose under the Florida Election Code is to canvass election returns, certify the results of the election, and declare a winner for each office based on that certification. *Id.* The Commission is under a strict duty to certify as soon as all county returns are received, and, in any case, no later than seven days following a general election. If any county returns "are not received by the Department of State by 5 p.m. of the seventh day following an election, [they] shall be ignored, and the results shown by the returns on the file shall be certified."[2] *Id.* § 102.111(1).

[1] In this case, Florida's governor recused himself from the certification process and Florida's Commissioner of Agriculture, Bob Crawford, was appointed to fill the vacancy.

[2] Florida law contemplated that the election results would be certified no later than the seventh day following the election. Fla. Stat. § 102.111 (2000). For federal offices, however, a winner may not be declared until three days later. That is, however, not a matter of state law; it results from a consent decree between the state of Florida and the United States which requires Florida to count absentee ballots from citizens living outside the United States that are received up to 10 days following a federal election. Bush Petition App. at 27a, n. 46l.

C. The Division of Elections

The Division is a sub-agency within the Department of State and is subordinate to the Secretary and to the Commission. It functions as the support and advisory staff to the Commission. *Id.* § 102.111(2) (2000). The Florida Legislature has also specifically empowered the Division to provide advisory opinions interpreting the Florida Election Code, Chapters 97 to 106, Florida Statutes (the "Election Code") and regarding other elections matters:

> *The Division of Elections shall provide advisory opinions when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws* with respect to actions such supervisor, candidate, local officer having election-related duties, political party, committee, person, or organization has taken or proposes to take. A written record of all such opinions issued by the division, sequentially numbered, dated, and indexed by subject matter, shall be retained. A copy shall be sent to said person or organization upon request. Any such person or organization, acting in good faith upon such an advisory opinion, shall not be subject to any criminal penalty provided for in this chapter. *The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought, unless material facts were omitted or misstated in the request for the advisory opinion.*

Id. § 106.23(2) (emphasis added). The Division is thus given primary responsibility for interpreting the Election Code, and its interpretation "until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought." *Id.*

D. The Attorney General

Florida's Attorney General, like the Secretary, is an independently elected, co-equal cabinet officer. The Attorney General is the chief legal officer of the state and may generally issue advisory legal opinions. Fla. Stat. § 16.01(9) (2000). Opinions of the Attorney General, unlike those of the Division, are not binding on the party seeking the opinion. *See State v. Family Bank of Hallandale,* 623 So. 2d 474, 478 (Fla. 1993); *Goodman v. County Court*, 711 So. 2d 587, 589 (Fla. Dist. Ct. App. 1998).

The Attorney General does not issue opinions on election matters. *See* Op. Att'y Gen. Fla. 86-55 (1986) ("it is the policy of this office to refer all questions concerning the Elections Code, . . . to the Division [of Elections] for its response"); Op. Att'y Gen. Fla. 87-17 (1984) ("any question relating to the applicability or possible violation of Ch. 106 or other provisions in the Florida election laws should be submitted to the Division of Elections"). Indeed, in a recent

response to a request for an opinion, the Attorney General's office stated that it lacked jurisdiction to issue an opinion on an election matter:

> After reviewing your correspondence, I regret to inform you that the Attorney General's Office *does not have jurisdiction in this matter*. I have taken the liberty, however, of forwarding your letter to the Department of State, Division of Elections, which appears to be the appropriate authority to review your concerns.

Letter from Paula Wood to Frank Cuomo, dated May 30, 2000 (emphasis added).

II. THE ELECTION CODE

A. Compiling Election Results and Certifying a Winner

Chapter 102 of the Florida Statutes provides the statutory framework for certification of election results. Elections are administered by local officials in each county. Each of Florida's 67 counties has its own election canvassing board, whose function is to compile the results from the various precincts in the county and transmit a return to the Commission. Fla. Stat. § 102.141 (2000). These returns must be filed immediately upon the certification of the county's election results by the county canvassing board and, in any event, "by 5 p.m. on the 7th day following the . . . general election."[3] *Id.* § 102.112(1).

The Commission is charged with the duty of certifying the results of statewide elections and declaring a winner based on the returns filed by the county canvassing boards. *Id.* § 102.111. It is required to perform this function and to declare the winner of the election immediately upon receipt of returns from all counties. *Id.* § 102.111(1). If any county fails to file its return within seven days of a general election, the Commission is directed to ignore that county's returns and certify the results of the election and to declare a winner based solely on the returns that were timely filed. *Id.*

In performing its certification function, the Commission is not allowed to go look beyond the face of the return or question the veracity of the return submitted by the counties. It is, however, allowed to reject a return that appears "irregular or false" such that the Commission is unable to determine the true vote for any office. *Id.* § 102.131.

B. Pre-Certification Election Protests and Manual Recounts

Any candidate or voter has the right to file an election protest with the county canvassing board. *Id.* § 102.166(1). The protest procedure is typically resolved informally by the board and does not involve the Florida courts. The protest may be filed by the *latter* of five days after the

[3] As discussed in note 1, *supra*, certification occurs on the 10th day following a federal election.

election or the date the results of the election are certified to the state. *Id.* § 102.166(2). Protests are typically used to address only the computation of election results.

As part of the protest procedure, any candidate or political party (but not a voter) may request a manual recount within 72 hours of the date of the election. *Id.*§ 102.166(4). In response, the county canvassing board may conduct a partial recount involving at least one percent of the votes cast for the protesting candidate. *Id.* 102.166(4)(d). If this sampling shows an "error in vote tabulation," there are several steps to be followed. Specifically, the county canvassing board must:

(a) Correct the error and recount the remaining precincts with the vote tabulation system;

(b) Request the Department of State to verify the tabulation software; or

(c) Manually recount all ballots.

Id. § 102.166(5). The Election Code provides procedures for assigning the officials responsible for the recount and defines their functions but does not contain any criteria by which ballots are to be evaluated. *Id.* § 102.166(6).

C. Post-Certification Election Contests

Following certification of the results of the election by all counties, any voter, taxpayer or unsuccessful candidate may contest the results of an election. *Id.* § 102.168. A contest must be initiated within 10 days after the last county canvassing board certifies its returns to the state or a shorter time if a protest was filed. *Id.*§ 102.168(2).

A post-certification election contest differs from a pre-certification election protest in several respects:

- The contest is a full evidentiary proceeding, *Id.* § 102.168(2), while the protest is an informal administrative proceeding with no formal fact-finding or trial-type procedures. *Id.* § 102.166.

- The contest is conducted in a central location, the circuit court for the county of the state capital. *Id.* § 102.168(2). The protest, on the other hand, is administered by the county canvassing board in the county in which it is brought, and numerous separate protests may be raised in various counties. *Id.* § 102.166.

- The contest takes into account the impact of any perceived irregularities in the election as a whole. *See Nelson v. Robinson*, 301 So. 2d 508 (Fla. Dist. Ct. App. 1974); *Smith v.*

Tynes, 412 So. 2d 925 (Fla. Dist. Ct. App. 1982). A protest, in contrast, is limited to the county in which it is brought. Fla. Stat. § 102.166(1) (2000).

- A contest requires an affirmative evidentiary showing by the petitioner that (i) there has been misconduct, fraud or corruption, (ii) the winning candidate is ineligible for office, (iii) legal votes were rejected, and that those votes would change the outcome of the election, or (iv) another circumstance proving that the outcome of the election was incorrect. *Id.* § 102.168(3). Conversely, no specific evidentiary showing is required for a protest. *Id.* § 102.166(3).

Unlike a protest, there is no specific time limitation on an elections contest. Indeed, there have been times in Florida when a contest resulted in the removal and substitution of an officer well into his term. By federal law, though, a contest for any presidential election must be completed six days before the meeting of the state electors, which in this case is December 18, 2000. 3 U.S.C. § 5 (1997).

ARGUMENT

I. FLORIDA LAW AS APPLIED PRIOR TO THE DECISION BELOW.

Before the Supreme Court of Florida issued the decision below on November 21, Florida elections were administered according to long-standing procedures set forth by the state legislature. These procedures required results to be reported and certified by specified deadlines, provided mechanisms for dealing with errors in vote tabulation, permitted manual recounts in certain limited circumstances involving a failure in the vote tabulation system, and allowed affected voters and candidates to contest an election after certification.

A. Election Protests and Certification Deadlines

Under the Election Code, any affected voter, political party or candidate may protest election returns before the canvassing board certifies the results of the office being protested, or within five days, whichever is later. Fla. Stat. § 102.166(1) (2000). In the event of a protest, the county canvassing board is required to follow specific procedures to verify the accuracy of the returns according to statutory procedures that vary depending on whether paper ballots designed for hand counting, voting machines, or machine tabulated paper ballots were used. *Id.*. § 102.166(3). In each case, the remedies are designed to ensure that the vote counting system functioned as intended. *Id.*

As part of section 102.166, only a candidate or political party is permitted to file a written request with the county canvassing board for a manual recount. *Id.* § 102.166(4)(a). Provided the request is timely, the county canvassing board is given discretion to decide whether to allow a statutorily-defined sample manual recount to determine whether there was a mechanical or software problem in the vote tabulation. *Id.* § 102.166(4)(c).

In any case, however, the protest period and any recount had to be completed and the election results certified to the Florida Department of State within seven days of the election. *Id.* § 102.111(1). Immediately upon certification by the county canvassing boards, the Commission was required to certify the elections results and declare a winner. *Id.* If any county failed to certify by the deadline, the Election Code required that its returns be ignored and the certification proceed notwithstanding the omissions.

B. Post-Certification Election Contests

The conclusion of the seven-day protest and certification process triggers the right of any affected voter, taxpayer or unsuccessful candidate to file an election contest. *Id.* § 102.168(1). Unlike pre-certification protests, which are reviewed by local officials on a county by county basis, a contest takes into account all facts and circumstances regarding the election on an evidentiary record to determine whether the ultimate result was affected by the alleged irregularities. *See Nelson v. Robinson*, 301 So. 2d 508 (Fla. Dist. Ct. App. 1974); *Smith v. Tynes*, 412 So. 2d 925 (Fla. Dist. Ct. App. 1982). Because contests focus on the results of the entire election, they cannot be strategically limited to increasing the vote count in selected strongholds of one party or candidate.

The Florida Legislature imposed no specific time limitations on a judicial election contest, but imposed strict time limits on protests and recounts that precede certification, which is the prerequisite to a contest. This difference reflects a legislative policy in favor of resolving all election disputes, other than errors in the vote tabulation system, through a full evidentiary proceeding before a single trial court.[4]

C. Use of Pre-Certification Manual Recounting

Before the decision of the Florida Supreme Court, the Division had interpreted the Election Code to allow for a manual recount *only* where there was some failure in the vote tabulation system. This interpretation was based on the language of section 102.166(5), Florida Statutes, which requires an "error in vote tabulation" for a full recount to be called and the legislative history of that provision, which indicated that manual recounts were to be used to

[4] Florida law provides that the exclusive venue for an election contest involving a statewide race is in Leon County, Florida, the seat of state government. Fla. Stat. § 102.1685 (2000). Exclusive venue in Leon County provides a single, centralized, judicial proceeding and avoids a multiplicity of lawsuits tried before various courts throughout the state regarding the same election. The Legislature's preference for election contests thus furthers the goals of judicial and administrative economy and finality of the result.

correct defects in the tabulation system rather than to remedy voter error in failing to properly execute ballots.[5]

The Florida Legislature has charged the Division with the responsibility of answering questions from the county canvassing boards concerning the conduct of elections formal advisory opinions. Fla. Stat. § 106.23(2) (2000). Consistent with the statutory scheme for manual recounts, legislative history and prior interpretation of the statute, the Division issued a formal advisory opinion, stating that:[6]

> [a]n "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. The inability of a voting system to read an improperly marked marksense or improperly punched punchcard ballot is not an error in the vote tabulation. *Unless the discrepancy*

[5] To minimize the possibility of voter error, general election voting instructions in conspicuous print were placed prominently in each polling place. Fla. Stat. § 101.46 (2000). In those counties using punch cards, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. The instructions included this specific direction:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

(emphasis in original). When voters followed the instructions, including the removal of any loose chips (chads) attached to their ballots, the automatic tabulation system accurately tabulated the ballots. There is no contention otherwise. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices, as directed, could be affected by the manual recount at issue. Florida law, as it existed before November 21, in no way required the results of an election to be altered based on such errors. *See, e.g., Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. Dist. Ct. App. 1984) ("[M]ere confusion does not amount to an impediment to the voters' free choice if reasonable time and study [by the voters] will sort it out.").

[6] This opinion was issued at the request of Palm Beach County, pursuant to the Division's duties under Florida law. Unbeknownst to the Secretary, Palm Beach posed an identical question to the Florida Attorney General, who issued a response contrary to that of the Division. JA 40-46, 63. The Division Opinion is an administrative interpretation of the statutes within its subject matter jurisdiction and is binding on subordinate agencies such as the county canvassing boards that request the opinion. This opinion "remains binding until properly amended or revoked by the Division itself, or invalidated by a court having jurisdiction of the matter." *Smith v. Crawfor*d, 645 So. 2d 513, 521 (Fla. Dist. Ct. App. 1994); *see also Krivanek v. Take Back Tampa Political Committe*e, 625 So. 2d 840, 844 (Fla. 1993). In contrast, no canvassing board is bound by an Attorney General's opinion. In fact, it is questionable whether the Attorney General has authority to issue an opinion on an election issue, given the specific allocation of this function to the Division in section 106.23(2), Florida Statutes.

> *between the number of votes determined by the tabulation system and by the manual recount of the sample precincts is caused by incorrect election parameters or software errors, a county canvassing board is not authorized to manually recount ballots for the entire county, nor perform any action specified in Section 102.166(5)(a) and (b), of the Florida Statutes.*

JA 57 (emphasis added). According to the Division's binding opinion, the failure of certain voters to properly execute their ballots was not a basis for conducting a pre-certification manual recount. In this regard, there is no basis in Florida law for a manual recount in selected counties in a statewide election.

The Division's interpretation was the statement of Florida law as it existed prior to the election. In section 102.166(5), Florida Statutes, the Florida Legislature used the term "vote tabulation" to mean, in the context of counties using automated tabulation, the result derived through the electronic or electromechanical equipment. The Division, having extensive experience with the application of the statute, recognized the term "tabulation" as a term of art that had consistently been used within the context of electronic or electromechanical equipment. When the votes are counted by the vote tabulation equipment, the legislature uses the terms "tabulate" or "tabulation," and when votes are counted manually, the Legislature uses the term "recount" rather than "retabulate." *See, e.g.*, Fla. Stat. §§ 101.5603(1), 101.5603(3), 101.5607(1)(b) and 101.5612.

Additionally, the Division interpreted the statutes as a coherent whole. When a sample manual recount indicates a problem with the vote tabulation system, the county canvassing board is first to attempt to correct the error and recount the remaining precincts with the system under section 102.166(5)(a), Florida Statutes. If the error cannot be corrected, the board should request the Department of State to verify the tabulation system under subsection (5)(b). Finally, if the system cannot be made to operate properly, then, as a last resort, the board may manually recount all the ballots under subsection (5)(c). Section 102.166(4) was enacted to provide a set of remedies when a vote tabulation system failed to read properly marked ballots, with a manual recount being the last and most drastic. The statute was not intended to allow individual county canvassing boards to use any method of counting votes they might choose *after* an election, nor was it intended to allocate votes from improperly executed ballots that could not be read by properly functioning tabulation equipment.

The Division's reading of the election law also harmonized section 102.166(5) with the other provisions in the Election Code. The reference to "vote tabulation" must be read in conjunction with various other provisions of the Election Code wherein the term "tabulation" is used in the context of the equipment itself. *See, id.* §§101.5603(1)(definition of "automatic tabulating equipment); 101.5606(3) ("automatic tabulating equipment will be set to reject all votes" under certain circumstances); 101.5607(1)(b) ("within 24 hours after the completion of any logic and accuracy test conducted pursuant to s.101.561(1), the supervisor of elections shall send by certified mail to the Department of State a copy of the tabulation program which was used in

the logic and accuracy testing"); and 101.5612 ("the supervisor of elections shall have the automatic tabulating equipment tested to ascertain that the equipment will correctly count the votes").

Finally, the legislative history confirmed that the Division's interpretation correctly implemented the will of the Legislature. The provisions of section 102.166, Florida Statutes, at issue were enacted by the Florida Legislature in 1989 in response to concerns about computer failure in elections and the use of unreliable software to tabulate votes. Ch. 89-348, § 15, Laws of Florida. These concerns had been raised in the 1988 race for the United States Senate between Buddy MacKay and Connie Mack and in subsequent news articles. The Legislature enacted sections 102.166(4)-(10), Florida Statutes, to address these concerns as part of what was called the "Voter Protection Act." The Senate Staff Analysis and Economic Impact statement for the Voter Protection Act (the identical Senate bill to the House bill that was passed) noted:

> An incident of mechanical problems with an electronic voting system occurred in Bradenton, Florida where a seventh of the county's precincts had to be counted twice in one election since the ballots were soggy, became warped and were mangled by the voting equipment. Also, an apparent software "glitch" or error was responsible for an incident in Ft. Pierce when a machine would count the Democratic votes, but would not accept Republican ones.
>
> Other horror stories related to electronic voting systems have been reported in the media, but in testimony before the Joint Committee on Information Technology Resources in 1989, supervisors of elections pointed out that there can be problems with any kind of voting system. However, many local election officials would agree that state certification procedures and local logic and accuracy tests provide a reasonable assurance that "electronic" elections are honestly counted. It is generally agreed that additional steps could be taken in Florida to improve security procedures, while not hampering the already cumbersome elections process, would enhance the public's confidence in our voting system.

Harris Response to Petition App. at 2.

As this legislative history indicates, the statute was intended to provide software verification and an alternate recounting procedure in connection with a protest, to be used in situations in which mechanical or computer problems caused the tabulation system to function improperly. The Division never interpreted the legislation to provide for manual recounts to evaluate ambiguous ballots that *voters* failed to properly execute.

Neither the language of the statute nor the legislative history indicate any intention to grant county canvassing boards plenary power to permit manual recounts for virtually any reason. The policy of Florida has been that state and county elections are conducted in a uniform manner throughout the state. To this end, the Legislature has placed the responsibility to "obtain and

maintain uniformity in the application, operation, and interpretation of the election laws" with the Secretary. Fla. Stat. § 97.012 (2000). The ability of each county canvassing board to establish its own standards for determining whether to conduct a recount and then establish its own standards for interpreting the intention of voters for various types of ballots (1) runs afoul of the purpose of establishing a uniform code and assigning an executive officer the responsibility of maintaining uniformity and (2) constitutes the unlawful judicial delegation of legislative authority by vesting the boards with unbridled discretion.

II. THE DECISION OF THE SUPREME COURT OF FLORIDA

The Supreme Court of Florida's decision brought about a significant shift in the way the Election Code is implemented and applied. In so doing, the court recognized that the new rules it propounded were at variance with the statutory scheme. It denounced "hyper-technical reliance upon statutory provisions," and noted that "there is no magic in the statutory requirements," obviously recognizing that the new rules it espoused deviated from the literal terms of the legislative scheme. Bush Petition App. at 9a, 36a. Similarly, while purporting to resolve "ambiguity" in state law and disclaiming any intent to rewrite the Election Code, the court's opinion makes it abundantly clear that it created new law not premised on the statutory language, but rather on newly created and generally defined equitable and state constitutional principles:[7]

> Because of the unique circumstances and extraordinary importance of the present case, wherein the Florida Attorney General and the Florida Secretary of State have issued conflicting advisory opinions concerning the propriety of conducting manual recounts, and because of our reluctance to rewrite the Florida Election Code, *we conclude that we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here.*
>
> *Accordingly, in order to allow maximum time for contests pursuant to section 102.168, amended certifications must be filed with the Elections Canvassing Commission by 5 p.m. on Sunday, November 26, 2000 and the Secretary of State and the Elections Canvassing Commission shall accept any such amended certifications received by 5 p.m. on Sunday, November 26, 2000, provided that the office of the Secretary of State, Division of Elections is open in order to allow receipt thereof.* If the office is not open for this special purpose on Sunday, November 26, 2000, then any amended certifications shall be accepted until 9 a.m. on Monday, November 27, 2000. The stay order entered on November 17, 2000, by this Court shall remain in

[7] The court found an ambiguity between sections 102.111 and 102.112 (which state that late filed results shall (or may) be ignored) and section 102.166(5), which allows for manual recounts. However, this statutory conflict results from the court's use of section 102.166(5) to create broad rights to pre-certification manual recounts that did not previously exist. By expanding the rights created by the legislature in this manner, the court created the very conflict it sought to resolve -- the fact that manual recounts cannot always be completed in seven days.

> effect until the expiration of the time for accepting amended certifications set forth in this opinion. *The certificates made and signed by the Elections Canvassing Commission pursuant to section 102.121 shall include the amended returns accepted through the dates set forth in this opinion.*

Bush Petition, App. at 37a-38a.

Pursuant to the Supreme Court of Florida's decision, and in contrast to the legislative scheme, Florida law now provides that:

1. County canvassing boards have the authority to amend returns filed within the statutory deadline for up to 12 days *after* the deadline for certification of the election results to accommodate pre-certification manual recounting;

2. The Commission must accept amended election returns filed after the statutory deadline so long as the filing does not violate the judicially created alternative deadline of November 26 that was designed to accommodate pre-certification manual recounting in this election[8] (*but see* Fla. Stat. §§ 102.111, 102.112);

3. The Commission is to ignore its statutory duty to certify election results based solely on the returns filed within the seven-day deadline set by the Legislature, so that late-filed amendments to timely filed election returns may be submitted to reflect pre-certification manual recounts that extend beyond the deadline (*but see*, Fla. Stat. § 102.111));

4. County canvassing boards enjoy broad discretion to order manual recounts in selected counties for a statewide election, even where the "error in vote tabulation" (i.e., the failure of the tabulation system) previously required under

[8] November 26 is an absolute deadline developed specifically for this Presidential election. For future elections, late results that reflect manual recounts must be accepted unless they are "so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process." Bush Petition App. at 32a. Like the November 26 deadline, this rule adds to the legislative enactments. Moreover, as the limitation on late filings applies only to electoral college proceedings, which must comply with the strict deadlines in Title 3 of the United States Code, there appears to be no basis to *ever* reject a late filing or late amendment of election results for any offices other than Presidential and Vice Presidential Electors. Thus, for most offices, the court has completely eliminated that finality and expedient certification required by the Election Code. Such is vastly different from the previously understood and applied the intent of sections 102.111 and 102.112. Further, it runs squarely into the requirement of the Florida Constitution that the Legislature convene in organizational session 14 days after the general election. Fla. Const. art. III, § 3(a). If the state certification must be permitted to remain open fourteen days after the election, the constitutional direction cannot be met.

statute has not occurred and even if the recount will extend beyond the statutory deadline for filing election returns (*but see.*, Fla. Stat. § 102.166(5)); and

5. When a uniform system of automated counting was previously in place, Florida's votes, including votes for the electoral college, will now be decided based on standards developed by individual canvassing boards in selected areas of the state.

As discussed below, the Florida Supreme Court's decision represents a significant departure from the pre-existing Florida elections law. The rules articulated by the Court are not based on the statutory language, and were not a foreseeable judicial interpretation of the Election Code.

III. THE DECISION BELOW ALTERED THE MANNER IN WHICH ELECTIONS ARE ADMINISTERED IN FLORIDA AND EFFECTIVELY REWROTE PORTIONS OF THE ELECTION CODE.

A. Prior to November 21, the Election Code Required Certification of Election Results Within Seven Days.

The requirement that certification be completed within seven days was expunged by the court below. In its place there is a new, judicially-created time limitation that allows filing up to 19 days after the election. Bush Petition App. at 38a. County canvassing board members are now under no duty to comply with the strict time limitations that previously existed; they can no longer be fined or have their returns ignored for failing to file certified returns when they conduct the pre-certification recounts, despite clear statutory language to the contrary. *Id.* In essence the requirement in section 102.111 that the Commission "shall ignore" late returns (or in section 102.112 the Secretary "may ignore" late returns) has been rewritten to read that the Commission "shall *not*" ignore late returns filed up to twelve days after the seven-day deadline has passed. Likewise, the statutory requirement that local boards "must" certify within this time frame has been eliminated.

Moreover, the Commission is now precluded from certifying election results on the seventh day following the election (or in federal elections the tenth day), as previously required under sections 102.111, 102.121 and 102.131, Florida Statutes. Indeed, even where certified returns were filed by all counties within the time limitations that existed before the November 21 decision, the Commission must now wait at least 19 days to certify the final results of the election, all so that pre-certification manual recounts may be completed.

Finally, the time frame for an election contest, the only procedure available to individual voters to challenge the outcome of the election, has been drastically shortened by the court. Under the prior law, the period for filing a contest would have begun with the final certification of results and the contest proceeding could have extended until December 12, the federal deadline for appointment of Presidential Electors. Now, any contest cannot begin until the recounts are completed and the results certified. This did not occur until November 26, cutting the contest

period almost in half from what was already an extremely short period in which to plead a case, conduct discovery, have a trial and pursue any subsequent appeals.

B. Prior to November 21, the Election Code did not Allow for Certified Election Results to be Amended by County Canvassing Boards.

Despite the total absence of supporting statutory language, county canvassing boards may now file amended returns after the statutory deadline has passed even if they had properly filed returns before the deadline. Bush Petition App. at 37a. Additionally, the Secretary has been divested of any discretion to reject an amendment, unless it is so late that it *will* (not may or could) preclude a candidate or voter from contesting the election or jeopardize the ability of the state to appoint Presidential Electors within the time limitations of federal law. *Id.* For purposes of this election, the court below determined that a deadline of November 26 met this newly articulated rule. Bush Petition App. at 38a.

Before the decision below, there was no provision in Florida law that expressly authorized returns to be amended, much less required an amendment after the statutory deadline to be accepted as a matter of right. There was no statutory provision that required the Secretary to accept late-filed returns or limited rejections of late filings specifically to situations where the federal time limitations jeopardized Florida's electoral votes. Both the ability to amend and the standards for the acceptance or rejection of an amendment have now been created judicially rather than legislatively.

Indeed, the existing Florida law required that "[i]f the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on the file shall be certified."[9] Fla. Stat. § 102.111(1) (2000). The Supreme Court's decision alters the statutory scheme, imposing upon the Secretary an absolute duty to accept all late filed returns even though the Legislature required her to do just the opposite. *Id.*

[9] This statute governs the Commission and sets forth its duties with respect to acceptance of election returns and certification of election results. A related provision, which speaks only to county canvassing boards, states that "[r]eturns must be filed by 5 p.m. on the 7th day following the . . . general election," and puts those boards on notice that "[i]f the returns are not received by the department by the time specified, such returns *may* be ignored and the results on file at that time may be certified by the department." Fla. Stat. § 102.112(1) (2000). Even if this provision, which applies only to county boards, were read to grant the Secretary some discretion in deciding whether to accept late returns, the construction by the Supreme Court of Florida requiring late filings and post-deadline amendments to be accepted without question is clearly a change in what might otherwise be understood from reading section 102.111, even in connection with section 102.112. There is no statutory support for reconciling a conflict between provisions that say the Secretary on the one hand "may ignore" and on the other "shall ignore" late returns by reading them to mean "shall not ignore" under any circumstances except those created by the court below.

C. Prior to November 21, Florida Law did not Allow Manual Recounting to be Used to Selectively Count Ballots that a Properly Functioning Automated Tabulation System Could not Count.

The decision below allows pre-certification manual recounts to be used in a significantly broader way than previously available. Prior to November 21, in the absence of a judicial decree rendered in an election contest action, manual recounting was allowed only in the case of mechanical, software, or other similar failure in the automated vote tabulation system and was considered dehors the common law. The Supreme Court of Florida has now departed from these limitations and recognized that manual recounts are equitably required and grounded in Florida law. While a state supreme court may generally create new common law or equitable rights, it may not apply such principles retroactively to a federal election. *See Roe v. Alabama,* 43 F.3d 574 (CA11,1995).

Under section 102.166(5), Florida Statutes, a manual recount was the last-resort remedy to be used in areas with automated tabulation systems that did not function properly to tabulate the ballots. When a sample manual recount indicated a problem with the vote tabulation system, a county canvassing board would have had to attempt to correct the error and recount the remaining precincts with the tabulated system. If the error could not be corrected, a board was allowed to request the Department of State to verify the tabulation system. Finally, only if the first two techniques failed and the system still could not be made to work properly, then, as the final remedy, the board could manually recount the ballots.

There was never any indication that section 102.166(5) allowed voter errors caused by improperly marked or punched ballots to be selectively corrected. The statute was enacted to provide a remedy when a vote tabulation system failed to read properly marked ballots, not to provide county canvassing boards the unbridled discretion to choose the method of tabulating votes on an *ad hoc* basis after an election was completed.

The Florida Legislature has never developed standards for manual recounts of ballots that could not be machine read. Numerous other states have developed such standards, including California, Wisconsin, Indiana and Colorado, to borrow the examples cited by the Attorney General below. The fact that Florida has not demonstrates that the legislature never meant to allow the broad use manual recounts that these other states have.

In the proceedings below, the Supreme Court of Florida was asked to create the types of standards that the Legislature chose not to enact. The court declined that invitation and chose instead to allow broad use of manual recounting without any standards to guide the process.

IV. EFFECT OF FINDING THE DECISION BELOW TO BE CONTRARY TO FEDERAL LAW.

The Supreme Court of Florida is the final arbiter of Florida law. The decision below impacts voters' rights and election law in Florida now and in the future, not only in presidential races but in all others as well.

Respectfully, these Respondents do not believe that this Court need interfere with the development of Florida law by its supreme court. The issue is solely whether the supreme court created a body of law regarding the selection of Presidential Electors different from the law existing on November 7, 2000. The court's opinion suggests that it did.

If the Court decides that there was a change, and that the change violated federal law, the Court would determine that the Division properly issued its opinions in November 2000 in response to election officials' inquiries; that those opinions were binding on the requesting elections' officials; that no manual recount provision existed under Florida law to remedy voter errors; and that no right existed in a statewide contest to conduct a manual recount on a selected county basis. Finally, this Court should find that the Secretary properly exercised discretion in rejecting requests for post-certification submissions of additional vote counts other than those from overseas ballots received by the tenth day following the election.

Appropriate relief would be to modify the judgment of the Supreme Court of Florida to the extent that it applied its decisional holdings to the selection of Presidential Electors on November 7, 2000. Such relief also would effectively affirm the order of Judge Lewis finding that the Secretary's exercise of jurisdiction in refusing to permit the submission of manual recounts to cure voter error beyond the seven-day legislative deadline and the Commission's certification on November 15 were proper. As a result, the totals certified on November 15 and the overseas ballots received as of November 17 would constitute the complete certification for the presidential election. No returns from manual recounts after the November 14 certification will be permitted to be counted in the total of votes cast for Florida Presidential Electors.

Respectfully submitted,

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November 28, 2000
Palm Beach County Canvassing Board Brief for December 1, 2000 United States Supreme Court Hearing to Review Florida Supreme Court Ruling

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT PALM BEACH COUNTY CANVASSING BOARD

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QUESTIONS PRESENTED

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

3. What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?

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Felix Frankfurter, *A Symposium on Statutory Construction, Foreward*, 3 Vand. L. Rev. 365 (1950) 11

Karl Llewellyn, The Common Law Tradition 373 (1960) 7, 9, 10

William D. Popkin, Statutes in Court, The History and Theory of Statutory Interpretation 246 (1999) 10

OPINION BELOW

The opinion of the Supreme Court of Florida (Pet. App. 1a-38a) is unreported as yet, but available on Westlaw at 2000 WL 1725434. The orders of the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida (Pet. App. 43a-51a) are not reported.

JURISDICTION

The final judgment of the Supreme Court of Florida was entered on November 21, 2000**.** This Court has jurisdiction to review a final judgment of the highest state court, under 28 U.S.C. § 1257. However, because the recounts that were permitted by the decision below have been completed, and the petitioner was certified on November 26, 2000 as the winner of the Florida election, the relief sought by the petitioner — to have been certified as the winner on November 14, 2000 — is superfluous, and the Article III, § 2 case or controversy requirement necessary for this Court's jurisdiction is questionable.

STATEMENT

The primary parties, Governor Bush and Vice President Gore, have submitted, and will submit, extensive statements of the events since November 7, 2000. The Palm Beach County Canvassing Board submits this abbreviated statement of the actions it took to discharge, in a non-partisan way, its statutory duties — actions that led to the decision below.

Following the November 7, 2000 general election the Palm Beach County Canvassing Board granted a request by the Florida Democratic Party for a manual recount of the

votes cast for President and Vice President, as set forth in section 102.166(4)(a), Florida Statutes.[1] Pursuant to section 102.166(4)(d), the Canvassing Board conducted a manual recount of just over 1% of the total votes cast.[2] Based on the results of that limited manual recount, the Canvassing Board exercised its statutory option to conduct a manual recount of the entire County.[3]

1. Subsection (4)(a) provides:

> Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

2. Subsection (4)(d) provides:

> The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue. In the event there are less than three precincts involved in the election, all precincts shall be counted. The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts.

3. Subsection (5) provides three options following the initial limited manual recount:

> If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:

(Cont'd)

After beginning the manual recount, the Palm Beach County Canvassing Board sought and obtained opinions from both the Secretary of State of Florida and the Attorney General of Florida as to as to whether the Canvassing Board could, in the circumstances presented and consistent with section 102.166(5), Fla. Stat., conduct a manual recount of the votes cast for the offices of President and Vice President of the United States in the November 7, 2000 general election, in accordance with the Board's unanimous vote to do so.[4]

The Secretary of State, through L. Clayton Roberts, Director, Division of Elections, provided an advisory opinion on November 13, 2000 (J.A. 56-58), which "construed the

(Cont'd)

> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.

4. Specifically, the Board asked:

> Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an "error in voting tabulation which could affect the outcome of" an election within the meaning of Section 102.166(5), Florida Statutes thereby enabling the canvassing board to request a manual recount of the entire county, or are "errors" confined to errors in tabulation system / software?

J.A. 47.

language 'error in vote tabulation' [in § 102.166(5)] to exclude the situation where a discrepancy between the original machine return and sample manual recount is due to the manner in which a ballot has been marked or punched." Pet. App. 10a. That advisory opinion, indicating that the recount in Palm Beach County was unauthorized, was binding on the Palm Beach County Canvassing Board "until amended or revoked." § 106.23(2), Fla. Stat.

The next day, the Attorney General issued an opinion disagreeing with the Secretary of State's statutory analysis and concluding that a manual recount was not limited to situations presenting errors in the vote tabulation system or software. *See* November 14, 2000 Attorney General Opinion 2000-65. (J.A. 40-46). Faced with the binding advisory opinion and a conflicting Attorney General Opinion, on November 14, 2000 the Palm Beach County Canvassing Board voted to suspend its manual recount pending a judicial determination of its rights and responsibilities under the law. The Canvassing Board filed a Petition for Extraordinary Writ in the Supreme Court of Florida, asking that Court to provide the definitive statutory interpretation. (Pet. App. 2a, n.1). Based on an Interim Order of the Supreme Court of Florida stating that there was no impediment to the vote count continuing (Pet. App. 41a), and the opinion below issued November 21, 2000 (Pet. App. 1a-38a) resolving the issue contrary to the view of the Florida Secretary of State, the Canvassing Board resumed its manual recount and completed it on the evening of November 26, 2000.

Earlier, in order to avoid the certification of statewide election results without the Palm Beach County tabulation, the Palm Beach County Canvassing Board intervened on November 13, 2000 in a lawsuit brought by Volusia County

against the Secretary of State to enjoin her from ignoring results submitted after November 14, 2000. Pet. App. 4a. The decision below details the chronology of that action, which ultimately joined with the original action brought by the Canvassing Board and resulted in the decision below. Pet. App. 4a-8a. That decision, which permitted the recounted vote to be considered, and set the certification date of November 26, 2000 to accommodate the need for the manual recount, is the decision that the petitioner seeks to set aside.

SUMMARY OF ARGUMENT

The Supreme Court of Florida's decision reconciling conflicting provisions of the Florida Election Code did not establish a new rule of law; did not depart from well established Florida law; did not violate the Due Process Clause or 3 U.S.C. § 5; and did not conflict with Article II, Section 1, clause 2 of the Constitution.

The decision of the Supreme Court of Florida was a classic example of a court making sense out of a conflicting statutory election code that threatened to discount the right to vote, one of the most fundamental of rights.

The decision below utilized standard principles of statutory construction to alleviate the tension between a 1951 statute, which mandated the state certification of election results on the seventh day following an election, and a 1989 statute, which permitted later filed local returns to be included for certification. Since Florida law authorized manual recounts, and those recounts could take longer than seven days, the Supreme Court of Florida harmonized the conflict by setting a certification date — November 26, 2000 — that allowed each actor to complete his or her task: the

Canvassing Board could count; the voter could be protected; the Secretary of State could certify; a dissatisfied candidate or voter could contest the election after certification. All of this was pursuant to statutes enacted prior to November 7, 2000.

Therefore, the decision below was in accord with 3 U.S.C. § 5, which requires states to resolve controversies relating to the appointment of electors "under laws enacted prior to" election day, and the decision below was consistent with the Florida statutory law, thus guaranteeing that Florida's electors shall be appointed "in such Manner as the Legislature thereof may direct." Article II, Section 1, clause 2 of the Constitution.

The Supreme Court of Florida decision should be affirmed.

ARGUMENT

I.

THE DECISION OF THE SUPREME COURT OF FLORIDA, RECONCILING THE STATUTORY AMBIGUITIES IN THE FLORIDA ELECTION CODE, DID NOT VIOLATE 3 U.S.C. § 5 OR THE DUE PROCESS CLAUSE

Karl Llewellyn, speaking of courts and statutes, wrote:

> But a court must strive to make sense *as a whole* out of our law *as a whole*. It must, to use [Jerome] Frank's figure, take the music of any statute as written by the legislature; it must take

> the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and to play it in harmony with the other music of the legal system.

KARL LLEWELLYN, THE COMMON LAW TRADITION 373 (1960) (emphasis in original). The Supreme Court of Florida's decision achieved that harmonious result.

The Supreme Court of Florida reconciled "the time frame for conducting a manual recount under section 102.166(4) . . . with the time frame for submitting county returns under sections 102.111 and 102.112." Pet. App. 17a.

Under section 102.111(1), enacted in 1951, if the election returns of a county "are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored and the results shown by the returns on file shall be certified." Pet. App. 22a. But under section 102.112(1), enacted in 1989, if county returns are not received by the Department of State by 5 p.m. on the 7th day following the general election, "such returns may be ignored and the results on file at that time may be certified by the department." Under 102.112(2), also enacted in 1989, the "department shall fine each [county canvassing] board member $200 for each day such returns are late."

The "shall — may" conflict becomes critical when the manual recount provisions of section 102.166 are triggered. As the Supreme Court of Florida explained, because a manual recount can be requested as late as "the sixth day following the election" (Pet. App. 21a), the seven day limitation could render the recount provision meaningless: "logic dictates that

the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days." Pet. App. 21a.

The Supreme Court of Florida's reconciliation of the conflicting statutes utilized accepted canons of statutory construction: a specific statute controls a general statute; a more recently enacted statute controls an older statute; construction of a statute should not "render meaningless or absurd any other statutory provision;" and "related statutory provisions must be read as a cohesive whole." Pet. App. 24-25a. And these rules were applied on the canvas of the right to vote, the most fundamental of rights. *See Burdick v. Takushi*, 504 U.S. 428 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' " *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184. . . . (1979)").

It is undisputed that the Florida statutes giving rise to this case, and the statute providing for election contests, section 102.168, Fla. Stat., were enacted prior to November 7, 2000. That alone should end the claim of alleged conflict with Title 3 U.S.C. § 5, because the safe harbor provided by the statute is premised upon the existence of "laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such state, by judicial or other methods or procedures. . . ." Nevertheless, the petitioner contends that the Supreme Court of Florida's reconciliation of the statutes and setting of a November 26, 2000 certification deadline made new law, and thus violated Title 3 U.S.C. § 5:

> This arbitrary judicial departure from the well-established law of Florida — as it plainly stood prior

> to November 7, 2000 — is in flagrant violation of Congress' federally imposed requirement that controversy over the appointment of electors be resolved solely under legal standards "enacted prior to" the date of the election. 3 U.S.C. § 5.

Petition for Writ of Certiorari, pp. 15-16.

> Where, as here, no preexisting rule of law required (or even authoritatively authorized) the Secretary of State to waive the time limit on the facts presented, 3 U.S.C. § 5 precludes the retroactive enforcement of a new rule of law compelling that previously unknown result.

Id. at 17.

The petitioner errs in calling the Supreme Court of Florida's opinion "a new rule of law." That opinion did what a court should do: "to quarry out of a legislative text the best sense which the text permits. . . ." LLEWLLYN, *supra*, at 381. The Supreme Court of Florida carefully construed the Florida Election Code "as a whole." Pet. App. 37a. Faced with a 1951 statute's mandate to ignore an eighth (or later) day return (a mandate that could not be followed anyway because overseas voters have a 10-day window, *see* Pet. App. 27a, n.47), the court sought to apply the Code in a sensible way.

> [I]ncreasingly, as any statute gains in age [,] its language is called upon to deal with circumstances utterly uncontemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense

> originally to be *put into it*, but rather for the sense which *can be quarried out of it* in the light of the new situation. Broad purposes can indeed reach far beyond details known or knowable at the time of drafting.

LLEWLLYN, *supra* at 374 (emphasis in original).

That judicial process is not "legislative;" it is quintessential common law judging — "the power to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The Supreme Court of Florida did adhere to preexisting law. Making sense out of that law does not, as the petitioner says, constitute "*post hoc* standards announced for the first time some two weeks after the election." Pet., p. 16, n. 4. What the Supreme Court of Florida did was not legislative, it was ordinary judging.

> More specifically, the judge is uniquely competent to place statutes in their temporal setting, taking account of what happens both before and after a statute is passed. Moreover, the exercise of this competence inevitably results from applying texts to facts, an exercise that forces the judge to think about how a text's meaning interacts with the past and the future (about the statute's intent). Once this thought process begins, judgment requires thinking about substantive values and comparative institutional competence; however, these are the results of ordinary judging. . . .

WILLIAM D. POPKIN, STATUTES IN COURT, THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 246 (1999).

The petitioner's premise — that "the Supreme Court of Florida has authorized a clear departure from the established legal requirements set forth by the Florida legislature that were in place on November 7" — is based upon a misconception of the judicial function. One role of the courts is "to make sense rather than nonsense out of the corpus juris." *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 101 (1991). Justice Frankfurter put it another way, quoting Lord Justice Denning in *Seaford Court Estates, Ltd. v. Asher* [1949] 2 K.B. 481, 499 (C.A.): " 'A judge must not alter the material of which it [an act] is woven, but he can and should iron out the creases.' " Felix Frankfurter, *A Symposium on Statutory Construction, Foreward*, 3 Vand. L. Rev. 365, 367 (1950).

The Supreme Court of Florida tailored its decision to preserve every aspect of the Florida Election Code. The opportunity to ensure the accuracy of the vote was preserved. The duty of the Secretary of State to certify election results was preserved. The opportunity to lodge a statutory post-certification election contest was preserved.

The Supreme Court of Florida decision was not arbitrary and it was not a departure from the well established law of process or the 3 U.S.C. § 5 requirement that controversy over the appointment of electors be resolved solely under

5. *amicus curiae* Representatives, p. 12, contends that by allowing a later certification not be finally adjudicated" by December 12, 2000 and that "may adjudication of such contests." The speculativeness of that

II.

THE SUPREME COURT OF FLORIDA OPINION DID NOT VIOLATE ARTICLE II, § 1, CL. 2 OF THE CONSTITUTION

Article II, § 1, cl. 2 provides that Electors shall be appointed "in such manner as the Legislature thereof may direct." The petitioner contends that the Supreme Court of Florida "has seen fit to revise the 'manner' in which Florida's electors are chosen by directing the Secretary of State to consider results from those counties that are conducting manual recounts. . . ." Under the petitioner's theory, no Florida court could reconcile conflicting state election statutes that implicate the choice of electors: "Had the Florida legislature seen fit to vest the decision in the hands of the judiciary, presumably it could have done so, but the simple fact is that it did *not* do so." Pet., p. 20 (emphasis in original).

The simple fact is, of course, that the Florida Constitution and the Florida statutes provide Florida courts with jurisdiction to resolve all controversies. Article V, Fla. Const.; Ch. 25, Ch. 26, Ch. 35, Fla. Stat. Election law disputes are just one *genre* of controversy suited to judicial review. There is nothing extraordinary about the Supreme Court of Florida's assumption of jurisdiction in this case. Indeed, if the petitioner were correct, election law disputes touching upon presidential electors could only be addressed *before* an election. That cannot be, because election disputes only occur *after* an election.

The petitioner's flawed view of the judicial function spoils his argument under Article II, § 1, cl. 2, just as it did under Title 3 U.S.C. § 5.

Florida laws enacted prior to November 7, 2000 governed this election and disputes arising from that election. The Supreme Court of Florida's resolution of the subsequent-to-election dispute was not a legislative act, nor was it contrary to the "manner as the Legislature thereof may direct." Art. II, § 1, cl. 2. While this election dispute may be extraordinary, the Supreme Court of Florida's decision was ordinary judging, and violated no federal constitutional or statutory principles.

III.

IF THIS COURT FOUND THAT THE DECISION OF THE SUPREME COURT OF FLORIDA DOES NOT COMPLY WITH 3 U.S.C. § 5, THE CONSEQUENCES WOULD BE NIL

If the Supreme Court of Florida decision were reversed, there would be no immediate consequences. The Secretary of State's certification of election results occurred on November 26, 2000. The petitioner sought to be certified as the election winner on November 14, 2000. His goal was delayed, not denied. Setting aside the Supreme Court of Florida decision would not change the certified election outcome. Indeed, the question posed in the jurisdiction portion of this brief seems pertinent; since certification has occurred, the remedy sought by petitioner is of little consequence now.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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November 28, 2000
Brief for Florida Senate as Amici Curiae for December 1, 2000 United States Supreme Court Hearing to Review Florida Supreme Court Ruling

No. 00-836

IN THE
Supreme Court of the
United States

GEORGE W. BUSH

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *ET. AL.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF THE FLORIDA SENATE AND HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1.Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. §5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State in such Manner as the Legislature thereof may direct.

3. What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. Sec. 5?

INTEREST OF THE *AMICI CURIAE* [1]

The Constitution and laws of the United States assign preeminent responsibilities to the State Legislatures in the process of appointing Presidential Electors. As we explain in this brief, the disposition of this case, especially in light of the additional question raised by the Court, will almost certainly have a substantial impact on how the Florida Legislature[2] will carry out those responsibilities in the present most unusual circumstances. Indeed, the Florida Legislature's interest is so great that it would have sought to intervene in the litigation below but for the circumstances that, until 14 days after the election, or November 21, 2000, the Florida Legislature was not lawfully organized and the constitutional offices of Speaker of the House, President of the Senate, and Clerk of the respective chambers were thus vacant. FLA. CONSTITUTION ART. III, §2, §3a.

SUMMARY OF ARGUMENT

The Constitution grants plenary authority to the State Legislatures to appoint their Presidential Electors in any manner they direct. 3 U.S.C. §5 provides that, if a State's electoral process is timely and conforms to pre-existing rules, Congress will regard the results of that process as conclusive of which Electors were appointed in the manner directed by the State Legislature. When the electoral process has failed to make a choice that is timely and conforms to pre-existing rules, then under 3 U.S.C. §2 the State Legislature must appoint Electors to assure that the State's Electors are counted by Congress when exercising its counting authority. The Legislature itself, and not

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The Florida Legislature has secured the consent of all parties to the filing of a brief as *amicus curiae* and those consents are being lodged with the Clerk of the Court.

[2] We will use the term "Florida Legislature" to refer to both the Florida Senate and the Florida House of Representatives.

the courts, is the arbiter of when a failure to make such a choice has occurred.

In view of the constitutional and statutory schema, this Court should rule that the question whether the state electoral process deviated from pre-existing law under 3 U.S.C. §5 is not justiciable but is instead a political matter to be decided in the first instance by the State Legislature under U.S. CONST. ART. II, §1, ¶2 and 3 U.S.C. §2, then by Congress when exercising its counting authority under U.S. CONST. Amend. XII and 3 U.S.C. §15.

If the Court finds that the issue is justiciable, it should rule that whether the state electoral process has conformed to pre-existing rules is a federal question under U.S. CONST. ART. II, §1, ¶2 and 3 U.S.C. §5, to be resolved ultimately by this Court and not by the highest state court.

If the Court also concludes that the electoral process at issue deviated from pre-existing law, and therefore did not comply with 3 U.S.C. §5, then it should order the Florida courts to correct those deviations before December 12 in order to assure that Florida's Presidential Electors will be determined by the choice of the voters under those pre-existing rules. If those deviations cannot be corrected by December 12, then it will be necessary for the Florida Legislature to exercise its authority to appoint Electors to assure Florida is represented in the Electoral College.

ARGUMENT

1. The State Legislature Has Plenary Authority To Appoint Electors And, When An Election Fails To Make A Timely Choice Pursuant To Pre-existing Rules, It Must Exercise That Authority To Assure Its Electors Are Counted By Congress.

The Constitution of the United States grants each State Legislature the plenary power to appoint that State's Presidential Electors. See U.S. CONST. ART. II, §1, ¶2 ("each State shall

appoint, in such manner as the Legislature thereof may direct, a number of Electors."). This clause confers "plenary power to the state legislatures in the matter of the appointment of electors." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). "'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states.'" *Id.* at 34 (quoting favorably Senate Rep. No. 395, 1st Sess. 43d Cong. (1874)).

The Constitution places upon Congress the duty to count the votes of the Electors whom the states have appointed. U.S. CONST. Amend. XII. Implicit in this duty is the authority to resolve disputes about whether the Electors have in fact been appointed in the manner directed by the State Legislature. Congress has enacted statutes to regulate its counting of electoral votes. These statutes have been codified in Title III of the United States Code.

Where, as in Florida, the Legislature has chosen to use an election to determine which Electors to appoint, 3 U.S.C. §5 provides that the results of that election shall be deemed conclusive by Congress when it counts electoral votes, provided controversies regarding that election are resolved in a manner that is both timely (here before December 12, 2000) and in conformance with rules and procedures adopted prior to the election. Timeliness is crucial because of, among other things, the importance of having a President and allowing preparations for an orderly transition. Even more crucial is the principle embodied in Section 5 that the rules of the election must be set before the election and cannot be changed after it becomes clear who would benefit from such a change. Otherwise the law would encourage post-election manipulations of election law to alter the outcome of a Presidential race.

If a State's election "has failed to make a choice" that is timely and conforms with pre-existing law, then 3 U.S.C. §2 recognizes that appointment of Electors by the State Legislature is proper. In such a case, state legislative appointment would be necessary to assure the State will have Presidential Electors that will be counted by Congress under Title III. Indeed, the Florida

Legislature would have an affirmative constitutional duty to appoint Presidential Electors before December 18 to assure Florida is represented in the Electoral College, because the Constitution dictates that each State "shall" appoint the requisite number of Presidential Electors "in such Manner as the Legislature thereof may direct." U.S. CONST. ART. II, §1, ¶2. Where purported Electors have been chosen by an election process that was not conducted in the manner that the State Legislature had directed, then it becomes necessary for the State Legislature to exercise that appointment authority directly.

2. The Question Whether A State Election Of Presidential Electors Has Failed To Make A Timely Choice That Conforms To Pre-existing Rules Is A Matter To Be Decided By The Political Branches Rather Than By The Courts.

Although no single provision explicitly addresses which entity is responsible for deciding whether an election failed to make a choice that is timely and in conformance with pre-existing law under 3 U.S.C. §5, a careful reading of the Constitution and the United States Code dictates the answer: the responsibility falls first to the State Legislature and, if it has not exercised that prerogative, then to Congress.

Article II, Section 1, of the United States Constitution expressly grants each State Legislature the authority to assure that its Electors are chosen in the manner it has directed. This constitutional power is conferred directly on the State Legislature, not on the State as a whole, and cannot be limited by state courts or even by a state constitution:

> "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. . . . This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the

> legislature to resume the power at any time, for it can neither be taken away nor abdicated."

McPherson, 146 U.S. at 34-35 (favorably quoting 1874 Senate Report, *supra*).

Because of the constitutional nature of a State Legislature's appointment authority, Title III of the United States Code cannot be understood as a limitation on the State Legislature's authority to appoint Presidential Electors. *See* 18 CONG. REC. 47 (1886) (statement of Rep. Dibble). Congress has no power to limit the exercise of a constitutional power granted directly to the State Legislatures. As Charles Pinckney stated:

> Nothing was more clear . . . than that Congress had no right to meddle with [the electoral college] at all; as the whole was entrusted to the State Legislatures, they must make provisions for all questions arising on the occasion.

KURLAND & LERNER, FOUNDER'S CONSTITUTION 553. Instead, Title III merely regulates how Congress will exercise its own constitutional authority to count the electoral votes it receives.

Indeed, even if it were constitutionally permissible for Congress to limit the appointment authority of State Legislatures, there is no reason to think Title III was ever intended to do so. Sections 2 and 5 of Title III were enacted as part of the Electoral Count Act of 1887, Ch. 90, 24 Stat.373, the very title of which emphasizes that it merely regulates Congress's own authority to "count" electoral votes in cases where it is disputed whether the Electors were appointed in the manner directed by the State Legislature. Likewise, it is plain this Court did not understand Sections 2 and 5 to have limited the appointment power of State Legislatures, since the *McPherson* opinion in 1892 re-emphasized the plenary nature of that appointment authority five years after the Electoral Count Act was enacted. Being enacted in a period between this 1892 opinion and the 1874 Senate Report quoted above, the Electoral Count Act of 1887 surely reflected the contemporaneous constitutional understanding that State Legislatures had

exclusive authority over their appointment power, and did not mean to abrogate it.

Where a State Legislature has directly appointed its Electors because there was no election or it was determined that (for reasons of timeliness or deviation from pre-existing rules) the election failed to make a choice, there can be no legitimate dispute in Congress whether the directly appointed Electors were appointed in the manner directed by the State Legislature and thus should be counted. The direct appointment removes any ambiguity about the exercise of the State Legislature's appointment authority. Thus, 3 U.S.C. §2 provides that Congress will recognize those direct appointments when Congress exercises its own counting power. Congress has a constitutional obligation to count the votes of any qualified Elector who was indisputably appointed by the State Legislature.

Section 5 of Title III is meant to address the more complicated case where the State Legislature has not directly appointed its Electors but has instead directed that those Electors be chosen in an election conducted according to certain rules. Where the election process is conducted according to those pre-existing rules, then under Section 5 its results are conclusive on Congress when it counts the electoral votes. But Title III recognizes that controversies might arise about whether an election was in fact conducted according to pre-existing rules, raising questions about the validity of one or more slates of Electors. This would create an ambiguity about whether (or which of) the purported Electors were constitutionally appointed in a manner directed by the State Legislature. To resolve such controversies, Section 15 of Title III provides that it will then be up to Congress to determine whether the votes of the Electors before them have been "regularly given" in compliance with the timeliness and pre-existing rules provisions of 3 U.S.C. §5. *See* 18 CONG. REC. 30 (1886) (statement of Rep. Caldwell); *id.* at 47 (statement of Rep. Cooper). Section 15 goes on to set out elaborate rules for how the House and Senate will resolve objections that the votes of particular Electors were not "regularly given." In essence, such objections are resolved by the concurrent agreement of the House and Senate, and where

they disagree the Electors who will be counted are those who were certified to Congress as the correct Electors by the State Governor. 3 U.S.C. §15. These elaborate rules would not have been necessary if Congress had envisioned the courts would decide the issue of which Electors' votes were "regularly given."

The Florida Legislature respectfully submits that the Court should rule that questions regarding whether the electoral process has conformed with pre-existing law are not issues for this Court. Such questions should be determined by the State Legislature or, if it fails to act by December 18 when the Electors cast their votes, by Congress when it counts those electoral votes on January 6, 2000. Such a ruling that these are non-justiciable questions to be resolved by the political branches would recognize that the Constitution vests the State Legislatures with the power to appoint Electors, and Congress with the power to count their votes. It also makes the most sense of the United States Code governing how Congress exercises its counting powers. The alternative would put this Court in the uncomfortable position of seeking to enjoin how Congress exercises its constitutional counting authority and how the State Legislatures exercise their constitutional appointment authority.

The situation is analogous to that under Article V, which requires that amendments to the Constitution be ratified either by conventions or by three-fourths of the State Legislatures. This requires determinations of the equally political (but even more fundamental) question whether each State Legislature has duly ratified, pursuant to Article 5, a proposed amendment to the Constitution. Even without any express constitutional provision empowering Congress to count ratifications by State Legislatures, this Court has ruled that "the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." *Coleman v. Miller*, 307 U.S. 433, 450 (1939). Indeed, four concurring Justices stated that "Congress has sole and complete control over the amending process, subject to no

judicial review." *Id.* at 459 (Black, J., joined by Roberts, Frankfurter & Douglas, JJ., concurring).

A ruling of non-justiciability would avoid involving this Court in a political dispute best resolved by the political process.[3] It is neither surprising nor inappropriate that the law should lodge that authority in the State Legislatures and Congress. What is at stake here is after all a political determination of who shall be the next President. The issue to be determined is uniquely political. Nor is it likely to recur. Thus, in this rare circumstance, it is entirely appropriate to have it resolved by the branches of government that are most responsive to the will of the people. "The constitution . . . recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object." *McPherson,* 146 U.S. at 27. In any event, whether desirable or not, that is the constitutional scheme. *Id.* at 35 ("The question before us is not one of policy, but of power.")

In short, the Florida Legislature submits that the issue of whether its state electoral process has complied with pre-existing law and the directions of the State Legislature is a non-justiciable issue best resolved by the State Legislature responsible for giving those directions. It may be that Congress in exercising its counting authority under U.S. CONST. Amend. XII or 3 U.S.C. §15 may make its own determination of this question. In either event, such determinations should not be reviewable in any court. If this Court rejects that contention,

[3] That the questions the parties ask this Court to answer are political in nature is a conclusion that accords with several of the criteria set out in *Baker v. Carr*, 369 U.S. 186, 271 (1962). There is indeed a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* Moreover, a decision that would in effect decide the outcome of a Presidential election is "of a kind clearly for nonjudicial discretion." *Id.* Also the Court's intervention may be taken to imply "lack of respect due coordinate branches of government." *Id.* And finally there is indeed the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

then it must determine for itself whether the state electoral process has complied with the provisions of 3 U.S.C. §5 and the State Legislature's directions under U.S. CONST. ART. II, §1, ¶2. But, as demonstrated in the next section, the one entity that cannot be allowed to have sole unreviewable authority on this issue is the Supreme Court of Florida.

3. If This Is A Matter Justiciable By The Courts, It Is A Matter of Federal Law To Be Determined Ultimately By This Court.

If this Court rules that the issue is justiciable, then the Supreme Court of Florida cannot have the last word on what is, after all, a question of federal law. 3 U.S.C. §5 provides an express federal statutory requirement to have elections for Presidential Electors determined by pre-existing state election law. The question whether that federal requirement has been violated by a change in state law, if justiciable at all, is justiciable as a federal question. Likewise, U.S. CONST. ART. II, §1, ¶2 requires that Electors be appointed in conformance with the directions of the State Legislature. The issue of whether that constitutional requirement has been met, if justiciable, clearly presents a question of federal constitutional law.

Section 5 of Title III lays down a federal standard for judging whether there has been such a failure to choose Electors: the appointment of Electors set out in state law "shall be conclusive, and shall govern in the counting of the electoral votes" but only if the State has "provided, by laws enacted *prior* to the day fixed for the appointment of electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors . . . by judicial or *other* methods or procedures" 3 U.S.C. §5 (emphasis added).

Florida has in place an election code for the resolution of disputes and a court system, including a supreme court, with the usual judicial powers of such courts. This does not mean, however, that therefore whatever conclusion emanates from the Supreme Court of Florida must be taken as correct and final by this Court, the Florida Legislature and the Congress. Such a

reading of Section 5 would fail to offer assurance, which it is surely the intent of the Section to provide, *see* 18 CONG. REC. 47 (1886) (statement of Rep. Cooper), that the rules and directions of the State Legislature have not been altered after the election to suit a particular outcome. Even if the section grants only procedural justice, what is in question here is precisely a change of election procedure. Pre-existing law did not provide that the election procedure would be whatever the Supreme Court of Florida decided it would be after the election. Rather, the pre-existing law provided that detailed statutory procedures were to be followed and that some issues were to be resolved by the Secretary of State (one of the "other methods or procedures" recognized under §5) rather than the courts. The Florida courts cannot be the final arbiter of whether they themselves have changed the methods and procedures directed by the Florida Legislature. *See,e.g., Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (review in the United States Supreme Court will lie to determine whether a state court has misinterpreted state law to defeat a federal right).

Federal constitutional law is replete with instances in which a matter rests upon a determination of state law provided that the final state interpretation or application of that law does not depart from previously established state law. The rules of property law, for example, are exclusively the creation of state law, but in enforcing the Fifth Amendment's proscription against taking property without just compensation, the federal courts review whether state law changed from what had previously been state law. *See Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1029 (1992) (property limitations that are "newly . . . decreed" by state courts can be takings if they do not reflect "restrictions that background principles of the State's law of property and nuisance *already place* upon land ownership" (emphasis added)); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (whether interest is the property of the owner of the principal depends on what the state law was prior to the regulation). Such an inquiry into the pre-existing condition of state law is also carried out to determine whether there has been a deprivation of "life, liberty or property, without due process of law." U.S. CONST. Amend.

XIV, §1. *See, e.g.*, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Similarly, the Constitution's *ex post facto* clause, U.S. CONST, Art. I, §10, would be deprived of meaning if inquiry into whether a State has changed its previous law were foreclosed.

In sum, where federal law requires that a rule of law, including a rule of state law, be previously established or enacted, as does 3 U.S.C. §5, it is a federal question whether the development of law by the courts, including state courts, constitutes an impermissible departure from such previous law. In this case, it appears that there may have been at least three sorts of departures from pre-existing law such as may deprive the choice of Electors of the conclusivity otherwise accorded to the state electoral process by Section 5.

First, the Supreme Court of Florida, by extending the mandatory statutory seven-day deadline for reporting county results to the statewide commission, delayed certification of the vote count after the election, and significantly shortened the time in which contests regarding the vote as certified might be brought and adjudicated. By compressing that time, the court increased the likelihood that such contests would not be finally adjudicated by the date that a final choice of Electors by an election must be made (here, December 12, 2000) and therefore that the Legislature, under Section 2, would have the power and duty to appoint Electors. That compression and the seriousness of its consequences may constitute an important obstacle and deterrent to the full and fair adjudication of such contests. It also appears dramatically to change the existing law by which the Florida Legislature sought to appoint Electors.

Second, the court below shifted responsibility to make any decisions about deadline waivers and interpretations of the election code to itself and away from the statute and the elected official, the Secretary of State, whom the Florida Legislature vested with the authority to make such decisions. The Supreme Court of Florida in essence re-wrote a statutory provision stating that voting returns "shall" be filed in time to say they "may" be filed in time, re-wrote a provision stating that the Secretary

"may" count late returns to provide instead that she "must," re-wrote a seven-day reporting deadline provided by the legislature to a nineteen-day deadline, and re-wrote a statute that said the Secretary of State's opinions "shall be" binding on county officials to say they shall not.[4] These post-election interpretations of the election laws do not appear to conform to pre-existing law.

Third, it appears that several of the county canvassing boards may have failed to adhere to the rules and standards for whether and how to do manual recounts that they had adopted in previous elections, i.e. rules and standards in force "prior to [this election]," or in fact changed those rules and standards after they had begun counting the ballots in this election. Such departures by county canvassing boards would appear to violate 3 U.S.C. §5, to deprive the choice made by ballot on election day of conclusivity and to require the Florida Legislature to appoint Electors. Nor does it appear that any such departures merely constituted the application to these circumstances of previously established legal principles—such as the primacy of the will of the people or the importance of determining ballot-by-ballot the intent of the voter. Such principles, invoked by the court below, are of such a high level of generality that they do not constrain at all and certainly do not offer the assurance required by section 5 that the State not change the rules after the election has been held to suit the political circumstances. The fact is that there are many possible tests for judging the intent of the voter, and having chosen certain tests before the election as those best calculated to determine that intent, it would appear that the county canvassing boards cannot change the tests in midstream.

[4] *See* FLA. STAT. §§102.111-112 (setting forth the deadlines); FLA. STAT. §106.23(2) ("The Division of Elections shall provide advisory opinions when requested The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought"); FLA. STAT. §97.012 ("The Secretary of State is the chief election officer of the state, and it is his or her responsibility to: (1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.")

Each of these departures from existing law may mandate a finding that Florida's election process has violated Section 5. If so, unless corrected – by the Florida Legislature or as ordered by this Court – those violations may jeopardize Florida's participation in the Electoral College.

4. The Consequences Of A Decision By This Court That The Florida Electoral Process Has Not Conformed To Pre-existing Law.

If this Court finds a violation of 3 U.S.C. §5, then it can order the Florida courts to correct the deviations from pre-existing law. Assuming these deviations are corrected by December 12, then the electoral process will have produced a result that conforms with 3 U.S.C. §5, and there would be no occasion for state legislative action.

Alternatively, the Court might conclude there was a violation of 3 U.S.C. §5, but the violation cannot be corrected by December 12. This might be the case, for example, if the Court concludes that any manual recounts must be conducted under the pre-existing standard and there is not enough time to re-do the manual recounts under that standard. In that case, the Florida Legislature would be obliged to appoint Electors under 3 U.S.C. §2 by December 18.

More complicated is the answer to the negative pregnant: what would be the consequences if this Court does *not* find that the Supreme Court of Florida violated 3 U.S.C. §5? Of course, if this Court should make such a ruling, the Florida Legislature, like other organs of government, state or national, would be bound to honor that determination. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). But the precise consequences would depend on the reasons given by the Court for its decision.

If the Court does not make the finding because it concludes that the issue is not justiciable, then the Florida Legislature would itself be required to decide whether the election results comported with pre-existing law, and if the Florida Legislature

does not make such a decision by December 18, Congress would be obliged to decide the issue on January 6.

Alternatively, if the Court limits its ruling, as Question 3 suggests, to whether the Supreme Court of Florida has deviated from pre-existing rules, it would remain incumbent upon the Florida Legislature and Congress to decide whether the apparent deviations from prior standards by the county canvassing boards were sufficient to justify legislative appointment of Electors under 3 U.S.C. §§2, 5, 15, and U.S. CONST. Art II, §1.

Finally, the Court might determine that departures from pre-existing methods and procedures by the Supreme Court of Florida are not sufficiently egregious to warrant correction by this Court. In that event, we would ask the Court also to rule that the Florida Legislature and Congress need not apply the same deferential standard and would thus not be bound by this determination in deciding whether, under the separate powers assigned to them by the Constitution, to appoint or count Electors.

CONCLUSION

The Court should rule that Questions 1 and 2 are not justiciable because their resolution lies in the hands of the Florida Legislature or, if it does not act, the Congress. If this Court nonetheless reaches those questions and concludes that the election decisions below deviated from pre-existing law, then the Court should order those deviations to be corrected before December 12, in which case the Electors will be determined by the choice of the voters under those pre-existing rules. If those deviations cannot be corrected by December 12, then it will become necessary for the Florida Legislature to exercise its authority to appoint Electors to comply with its constitutional duty to assure Florida is represented in the Electoral College.

Respectfully submitted,

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November 30, 2000
Reply Brief of Respondents by Al Gore

No. 00-836

IN THE

Supreme Court of the United States

George W. Bush,

Petitioner,

v.

Palm Beach County Canvassing Board, *et al.*,

Respondents.

On Writ of Certiorari
to the Supreme Court of Florida

REPLY BRIEF OF RESPONDENTS AL GORE, JR., AND FLORIDA DEMOCRATIC PARTY

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REPLY BRIEF FOR RESPONDENTS AL GORE, JR., AND THE FLORIDA DEMOCRATIC PARTY

Barely four days after this Court granted review in this case, petitioner has abandoned the principal ground on which his Petition for Certiorari rested: his assertion that 3 U.S.C. § 5 "requires" the States to act in a particular way in resolving controversies over the appointment of electors. Pet. i (Question 1); *id.* at 13, 16 n.4, 18. Petitioner now concedes that the statute does not *mandate* anything but simply sets forth a safe harbor protection against possible (currently only hypothetical) disputes in the Electoral College. Pet. Br. 17, 29.

While this concession all but demolishes petitioner's case, it does not prevent him from making a series of remarkable requests of this Court.

To begin with, he asks this Court to review a state-law claim involving garden variety principles of statutory interpretation. He mischaracterizes the Florida Supreme Court's decision, all but ignoring a central provision of the Election Code governing manual recounts. Yet in the end, as an examination of his brief will reveal, petitioner's argument of usurpation rests on that portion of the state court's decision determining the scope of the Secretary of State's discretion under a Florida statute to ignore ballots that were being counted pursuant to another statute's direction.

That decision was as routine as petitioner's request for federal court intervention is remarkable. Yet, perhaps because he recognizes that the decision below presents such a weak case for a claim of judicial "legislation," petitioner makes the implausible contention that *any* state judicial decision in this context – and, by implication, any state attorney general opinion or administrative ruling – is suspect if it is not "dictated by" existing statutes. Pet. Br. 21. To implement this federal judicial superintendence over each State's processes for choosing electors, petitioner would have the federal courts draw upon *Teague* v. *Lane*, 489 U.S. 288 (1989), not to *shield* state courts from federal intrusion as *Teague* sought to do but – standing *Teague* on its head – to use it as a sword to cut down state court rulings construing election statutes as applied to presidential

electors. Any such attack on the judicial function would disrupt state government by crippling the process of legislative interpretation at the time it is needed most.

To make so weak an argument might seem barely worth the candle until one sees petitioner's final request: He seeks a form of relief to which he could not possibly be entitled – vacatur. He says that such relief will "imbue the election with * * * finality," Pet. Br. 50, but he fails to explain how it could. Petitioner appears to seek nothing less from this Court than a declaration not only that the decision below was wrong, but that the Florida vote was certified on November 14 – not when it actually was, on November 26 – so that he can argue elsewhere that respondents' post-certification challenges to the election results should be tossed out as untimely. He seeks not just to run out the clock but, extraordinarily, to have this Court turn back the clock in pending Florida contest proceedings so that he can declare the game over.

While state courts are still struggling to determine whether all the lawfully cast ballots will be counted, petitioner seeks to secure this Court's blessing for leaving to historians the question of who garnered the most votes for President in the State of Florida on November 7, 2000.

This breathtaking combination of requests is pressed upon the Court in the name of order, finality, and the rule of law. In truth, petitioner seeks this Court's assistance in bending settled legal doctrines and deeply rooted constitutional principles, and in disregarding the plain language of congressional enactments – all based on a distorted view of the Florida Supreme Court's decision.

Ours is a different view, one that harmonizes this Court's decisions about federalism with its long-standing role in interpreting the Constitution and laws. Nothing in Article II or Title 3 prevents a state legislature from giving a state court the power to interpret its Election Code. Here, Florida's legislature did exactly that, just as many other States have. There is no basis for upsetting the decision of the Florida Supreme Court.

I. THE FLORIDA SUPREME COURT'S DECISION RECONCILING INCONSISTENT STATUTES DID NOT ENACT NEW LAW OR ABROGATE EXISTING LEGISLATION.

The Florida Supreme Court's decision was an interpretation of, not an amendment to, Florida statutes enacted prior to election day. See *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994) (when a court "construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. * * * Thus, it is not accurate to say that the * * * Court's decision * * * 'changed' the law that previously prevailed * * * ."). Whatever else may be said, it is clear that the Florida Election Code contains two provisions about filing deadlines, an older provision that says some late returns "shall be ignored," and a more recent one that says those returns "may be ignored." Compare Fla. Stat. § 102.111(1) with *id.* § 102.112(1). The Florida legislature exhibited its understanding of the difference between "shall" and "may" in 1989. Pet. Br. 22-23 n.6. Petitioner's effort to sweep aside any tension in the Election Code by chalking it up to "different terminology," *id.* at 4, misreads the statute and the Florida Supreme Court's opinion below.

Strikingly, petitioner's argument on the supposed errors committed by the Florida Supreme Court (Pet. Br.19-27) quotes Fla. Stats. §§ 102.111, 102.112, and 102.168, but fails even to cite the crucial statute – Section 102.166, which provides for recounts. That statute, among other things, provides that county canvassing boards "shall" conduct county-wide manual recounts when (as here) a sampling reveals errors that could have affected the election. The Florida Supreme Court was well within the bounds of ordinary statutory construction in holding that the Secretary of State did not have discretion to disregard the results of a recount that the statute requires the canvassing board to conduct. See, *e.g.*, *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (rejecting "hypertechnical reading" of tax statute); *Sanderson* v. *United States*, 210 U.S. 168, 175-76

(1908) (interpreting statute to allow court to grant new trial motion beyond two-year time limit for "grant" of such motions, because the motion could be made "at the last moment before the expiration of the two years"). Nor does petitioner acknowledge the plain text of the Florida Election Code, which states that the "official return of the election" must include "write-in, absentee and manually counted results." Fla. Stat. § 101.5614(8).[1]

Petitioner complains that the Florida Supreme Court in effect changed Section 102.112 to read "may not ignore" rather than "may ignore." Pet. Br. 23 (statute "at most" "leaves the power to exercise compliance with the certification deadlines to the Secretary's discretion").[2] That accusation is incorrect. The Florida Supreme Court first held that, under the statute, the Secretary of State "is permitted to ignore the returns." Pet. App. 28a. Only then did the court examine the basis for the Secretary's decision in this case, based on the record, and hold, "consistent with the Florida election scheme," *id.* at 35a, that the reasons proffered by the Secretary for rejecting the amended vote counts were inadequate as a matter of law. *Id.* The court's

[1] The houses of the Florida Legislature have filed a brief in support of neither party taking the view that "it appears" that "there may have been" departures from previous law in the Florida Supreme Court's decision. Fla. Legis. Br. 11. The Florida Attorney General, the state's chief law enforcement officer with the authority to issue opinions on Florida law, has taken a different view. See Fla. Att'y Gen. Br. 5-8. In any event, the Florida Constitution charges the Florida Supreme Court, not the Florida Legislature, with the ultimate duty to interpret state law. Nor are the views of the contemporary legislature entitled to any special weight with respect to the proper method of reconciling a 1951 statute (102.111) with a 1989 statute (102.112).

[2] At times, petitioner attempts to complain of a supposed change in the manner by which the manual recounts are conducted. *E.g.*, Pet. Br. 7, 25 n.8. But this Court denied certiorari in *Siegel* v. *LePore*, No. 00-837 (Nov. 24, 2000), and denied review of the question presented in this matter that related to the conduct of the manual recount. See *Bush* v. *Palm Beach County Canvassing Bd.*, No. 00-836 (Nov. 24, 2000) (Order granting certiorari). Petitioner's claim regarding the manner in which the recounts are conducted is thus outside this case altogether.

decision was a routine application of basic administrative law principles.

Petitioner focuses repeatedly on the Florida court's use of its "equitable" powers. Pet. Br. 11, 13, 21-22, 25, 26, 34, 46. But there should be no confusion. The court did not use its equitable powers in either aspect of the decision of which petitioner complains. Petitioner objects to the Florida court's holding that the November 14 deadline was not absolute – that is, that the Secretary was permitted to accept supplemental returns after November 14 – and to the court's imposition of a limit on the Secretary's discretion to "ignore" manually counted ballots submitted after that date. The court reached those two holdings on the basis of ordinary principles of statutory interpretation, not on the basis of equitable powers. Pet. App. 23a-25a, 31a-35a.

Nor is there anything to the charge that the Florida Supreme Court "amended" the statute by setting a deadline of November 26. Only after determining that the Secretary had violated the law did the court use its equitable powers to craft a remedy, in the form of new deadlines. The creation of such a remedy is an inherently judicial task, not a legislative one. In fact, the court used its equitable powers only to provide a *benefit* to petitioner in setting an outside date for the completion of the hand recounts. Respondents did not seek to have *any* deadline imposed. But the court decided, in the special circumstances of this election, to set an outside deadline for completion of the manual recounts.

The court's use of its equitable power thus worked no unfairness to petitioner. Allowing the legislature's manual recount provisions to be given effect is not like changing the rules after the game has been played. Cf. Pet. Br. 27, 28. It is instead like using a more powerful photo-finish camera – indeed, one already mandated by the legislature – to determine the winner of the race more accurately.[3]

[3] *Carmell* v. *Texas*, 529 U.S. 513 (2000) (cited in Pet. Br. 20), involved a change in rules "advantageous only to the State, to facilitate an easier conviction." *Id.* at 1633. Here, the purpose and effect of the Florida Election

II. THE FLORIDA SUPREME COURT'S DECISION COMPLIED WITH THE SAFE HARBOR PROVISION OF 3 U.S.C. § 5.

1. Petitioner has failed to demonstrate that the Florida Supreme Court's decision would take Florida's subsequent appointment of electors outside the safe harbor of 3 U.S.C. § 5. To begin with, he continues to insist that the statute requires the Florida courts to use the *substantive rules* that were in place at the time of the election. This notion flies in the face of the statute's plain language, which provides that a safe harbor shall be given to determinations that are made "by judicial or other methods or procedures" "provided[] by laws enacted prior to" election day. 3 U.S.C. § 5. It is thus the state's *dispute resolution process*, "by judicial or other methods or procedures," that must be in place before the election is held, and that must come to a conclusion six days before the electors meet.

As demonstrated in our brief on the merits, Resp. Br. 32, Florida law undeniably meets that requirement: the dispute-resolving procedure in place on election day did not change in any way. Petitioner does not disagree but argues only that the "contention" that 3 U.S.C. § 5 is "satisfied * * * by delegating to the state courts the authority to resolve disputes concerning the appointment of electors is plainly untenable," and "would offer none of the protections that Congress sought to achieve in enacting the statute." Pet. Br. 18-19. But he does not even bother to address the statute's plain language, nor does he come to terms with the extensive legislative history demonstrating that such a delegation would precisely serve Congress's purpose. See Resp. Br. 32-33.

Nor does petitioner even succeed on his own terms in demonstrating that the decision of the Florida Supreme Court

Code, as construed by the state supreme court, is to improve the accuracy of the vote count – not to benefit one particular side over another.

was anything more than an application of "laws enacted prior to" election day. See Part I, *supra*. While he argues at length that the decision was erroneous, he cannot demonstrate that the Florida court's decision amounted to an "enact[ment]" of a new law within the meaning of 3 U.S.C. § 5.

Because, on close examination, the decision below is a routine case of statutory interpretation, petitioner takes the extreme and remarkable position that a state court may never resolve a dispute under state law about the appointment of electors if its decision would amount to a "new rule" within the meaning of – of all cases – *Teague* v. *Lane*, 489 U.S. 288 (1989). Pet. Br. 20. While this Court should not lose sight of the fact that 3 U.S.C. § 5 is not concerned *at all* with the provenance of the *substantive* law applied by state courts, petitioner's extraordinary contention must be addressed. *Teague*, as this Court is well aware, sets out the standard for when a federal habeas court can take the extraordinary action of upsetting a state court criminal conviction on collateral review. It holds that this exceptional power may be exercised only when a decision contrary to that announced by the state court was "*dictated* by precedent." *Id.* at 301 (opinion of O'Connor, J.). *Teague* provides an appropriately narrow scope for federal court review of state court decisions. But *Teague* does not hold that "new rules" are *legislative* acts. Indeed, under *Teague* "new rules" *may* be announced by this Court on direct review of decisions of the State's highest courts. See, *e.g.*, *Johnson* v. *Texas*, 509 U.S. 350, 352 (1993). Under Article III, the federal courts are provided only with "judicial" authority; separation of powers principles prohibit them from "legislating." Yet, until now, it has never been suggested that these principles mean that federal courts cannot engage in statutory interpretation unless the result is "*dictated*" by pre-existing statutes.

Teague is animated by principles of federalism and respect for state courts as "coequal parts of our national judicial system." *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990). Petitioner would turn *Teague* on its head, transforming this rule designed to shield state courts into a sword by which the federal judiciary, in

challenges involving presidential electors, would supervise state courts' application of state law to determine whether those courts correctly discerned and applied local law. Petitioner would have the federal judiciary issue orders – pursuant to state law – regarding the details of state certification and contest procedures whenever the federal courts concluded that the state judiciary departed in any way from pre-existing state statutes. Far from honoring state courts, the *Teague* standard as applied by petitioner would trigger dramatic federal intrusion into the state judicial process. This result cannot be squared with principles of federalism or with the long history of statutory interpretation by state courts in the post-election context. It would also be contrary to the purpose of Title 3 – a statute designed to regularize the States' determination of challenges to the appointment of electors – to accord the statute this disruptive effect.[4]

2. As this Court suggested in the question it directed the parties to brief, even were this Court to find that the Supreme Court of Florida's decision took Florida's selection of electors outside the safe harbor provision, this Court could afford no judicial remedy. Section 5 does no more (and was carefully designed to do no more) than provide a State's slate of electors a safe harbor secure from challenge in Congress when the statutory prerequisites were met. The text plainly states that, "[i]f any State shall have" satisfied various criteria, its determination of its electors "shall be conclusive * * * so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5. That much is not in dispute. Indeed, petitioner has now abandoned the position he pressed just days ago that the failure to satisfy the criteria of Section 5 would entirely invalidate Florida's slate of electors.

[4] If this Court were to decide whether 3 U.S.C. § 5 embodies a standard for determining whether a state judicial statutory interpretation is so novel as to run afoul of federal law – which respondents do not believe is necessary to resolve this case – that standard would surely display much more deference to state courts.

Petitioner's new position is that this Court should vacate the decision of the Florida Supreme Court so that "executive officials in Florida would be able to discharge all of their duties" and "Congress would be able to give conclusive effect to the official certification of the Elections Canvassing Commission." Pet. Br. 13-14. There simply is no foundation for such a request.[5] Section 6 of Title 3 requires the governor of each State to certify the State's electors based on the "final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment" – a provision that notably is not limited to state law existing prior to election day.

In addition, Congress debated the provision ultimately codified as Section 5 for more than a decade and did not adopt the remedy petitioner proposes. To the contrary, the legislative history is unambiguous that Congress intended that noncompliance with Section 5 would do *no more* than put the outlier State beyond the safe harbor its text expressly provides. See Resp. Br. 23-28 (quoting, *e.g.*, 18 CONG. REC. 75 (Dec. 9, 1886) (statement of Rep. Eden) ("The bill contemplates no exclusion of electoral votes from the count because of the failure of a State to settle disputes as to the lawful vote of the State.")). Of particular note, petitioner would have this Court adopt as a supposed remedy under Section 5 a ruling appointing electors favorable to him, directly contrary to the statutory scheme under which Congress itself must make the choice between competing slates of electors. See 3 U.S.C. § 15.[6]

[5] Contrary to petitioner's assertion, Pet. Br. 32 n.10, decisions arising under the Extradition Clause of Article IV, § 2, cl. 2, and implementing legislation, 18 U.S.C. § 3182, preserve rather than undermine state autonomy and do not support the proposition that state electoral officials effectively act as federal "deputies." See *California* v. *Superior Court*, 482 U.S. 400, 407 (1987); *Fitzgerald* v. *Green*, 134 U.S. 377, 379 (1890).

[6] Petitioner takes irreconcilable positions with respect to Section 5. First, petitioner has maintained that 3 U.S.C. § 5 renders any method of appointing electors enacted subsequent to November 7 *invalid* as a matter of federal law. Yet he simultaneously maintains that the State Legislature may at any time appoint a slate of electors that Congress would be required to recognize.

A State's final determination made in noncompliance with Section 5's safe harbor provision would deprive the State only of the "benefit" "confer[red]" on it by Congress – the "benefit" of protection for its finally determined slate of electors from challenge in the House and Senate. Pet. Br. 17. But this Court lacks the power to reverse a State's decision to forgo a benefit the federal government need not have offered in the first place. For example, where Congress conditioned receipt of federal highway funds on States' adopting a twenty-one-year-old drinking age, this Court made clear that a decision not to do so "remain[ed] the prerogative of the State[]." *South Dakota* v. *Dole*, 483 U.S. 203, 211-12 (1987). If there had been a dispute about what a State had done and the State's highest court determined that it had adopted the younger age, it would not be entitled to the federal funds – but the state court decision plainly could not be reversed or vacated by this Court to avoid that consequence.[7] At most, then, the consequence of a determination by this Court that Section 5's conditions were not met might be to render the safe harbor provision inapplicable to Florida's selection of its electors, which might then not be "conclusive" in the event of a future dispute before Congress pursuant to 3 U.S.C. § 15.[8]

Second, petitioner asserts that this Court should construe 3 U.S.C. § 5 implicitly to confer upon federal courts the authority, untethered to either the text or the legislative history and never before suggested in an opinion of any court, to strike down a state court's interpretation of state law and potentially invalidate the slate of electors selected pursuant to state procedures under the authority of Article II, § 1. This, he maintains, is a simple matter of statutory construction. But the Florida Supreme Court's detailed analysis of the Florida Election Code, relying on settled principles of statutory construction, he regards as a lawless act of legislation.

[7] Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 28 (1981) ("[T]he typical remedy for state noncompliance with federally imposed conditions [on a government benefit] is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.").

[8] A declaration that Florida's appointment of electors was not made subject

Petitioner objects to this conclusion because, he argues, the Florida judiciary should not be able to prevent the State from obtaining the conclusive presumption set out in Section 5. Pet. Br. 31. He argues that it would frustrate Congress's purpose if state courts could issue "binding orders" that would deprive the State of the protection of Section 5. *Id.* at 30.

To begin with, this concern simply reflects his misreading of the statute. The presumption attaches whenever the State's dispute resolution process was set up before the election, not whenever a court that is part of that process adheres to any particular provision of "pre-existing" law. As a result, the judiciary *cannot* prevent the State from obtaining the protection offered by the statute by making a novel but routine construction of statutory gaps and ambiguities – so the decision below certainly could not have the effect of taking Florida outside the statute's safe harbor. But, in any event, petitioner is simply stating a complaint about the nature of state government. Section 5 leaves the choice of how to proceed to the States and, as this Court long ago observed, "[a] State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." *Ex parte Virginia*, 100 U.S. 339, 347 (1879). Just as it would be a matter of indifference as far as federal law were concerned whether a State adopted an under-twenty-one drinking age as a result of legislative or judicial action, so it would be a matter of indifference to federal law precisely which branch of a State's government had acted in a way that prevented the State from meeting the statutory condition of 3 U.S.C. § 5.

Petitioner also argues that significant consequences may flow from the decision below if it means the State's determination of its electors will not comply with the conditions in 3 U.S.C. § 5. Pet. Br. 30-34. Of course they may. But 3 U.S.C. § 5 still

to a "final determination" deemed "conclusive" by the statute might not have even that consequence if, in the end, the outcome of this election is not affected by the action of the Supreme Court of Florida because the final margin of victory proves to be greater than any shift in the vote count attributable to it.

contains no legal prohibition. Thus, while someone, even an official of another branch of state government, might have a complaint about an action that denied the State's electors the protection of Section 5, there would be nothing *unlawful* about it, and therefore no basis for this Court to order vacatur or reversal.

In any event, having conceded that Section 5 is just a safe harbor provision that would give "conclusive" effect to a State's determination of its electors if, as happened during the Hayes-Tilden election, more than one return purporting to contain the electoral votes of that State were to be received by the President of the Senate, petitioner has also necessarily conceded that it would be improper for this Court to rule on whether the procedure by which Florida will determine who its electors are complies with the statute.[9]

[9] It would plainly be premature for this Court to address compliance with Section 5, because no one in Congress has purported to rely on its provisions in determining whether the votes of electors from Florida shall be counted. Indeed, there has not been submitted "more than one return or paper" purporting to contain the ballots cast by Florida's legitimate electors. 3 U.S.C. § 15. And, even if 3 U.S.C. § 5 were read more broadly than the language of 3 U.S.C. § 15 appears to permit, so that it provided a safe harbor not only in cases where more than one set of votes might be received, but in *any* case in which objection would be made by a Senator and a Representative under 3 U.S.C. § 15 to an electoral vote, no such objection has yet been made to any electoral vote cast by any elector from the State of Florida. Petitioner's complaint about 3 U.S.C. § 5 at present thus involves only "uncertain or contingent future events that may not occur as anticipated, or that may not occur at all." 13A Charles A. Wright, et al. FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2d § 3532 (2d ed. 1995 & Supp. 1998).

Should the State of Florida appoint electors to whom petitioner objects, and should there then be some dispute about who the lawful electors from the State of Florida are, or whether the votes cast for the State of Florida in the electoral college are lawful, 3 U.S.C. § 5 might conceivably be invoked. If it is, and if petitioner believes he will be injured by its invocation, he will then be able to bring his "legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n, Inc.* v. *Sierra Club*, 523 U.S. 726, 734 (1998). Petitioner urges this Court to "eliminate the potential for a constitutional crisis" by ruling now on his Section 5 allegation. Pet. Br. 35.

3. The Florida Legislature wisely rejects petitioner's view, see Fla. Legis. Br. 1 (arguing that the only effect of 3 U.S.C. § 5 is that "Congress will regard the results of [the state] process as conclusive of which Electors were appointed in the manner directed by the State Legislature"), but propounds an entirely different theory for invalidating the Florida Supreme Court's decision that also contradicts the statutory text and the legislative history. The Legislature's Brief maintains that the failure to satisfy the criteria of Section 5 somehow triggers a state legislature's right to appoint a slate of electors under 3 U.S.C. § 2. Fla. Legis. Br. 2. But Section 2 says no such thing, providing simply that "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State shall direct." It is fallacious to equate a situation where a State "has failed to make a choice" on election day, 3 U.S.C. § 2, with one where the procedures by which it has determined who its electors are is not entitled to the statutory presumption purportedly created by 3 U.S.C. § 5.

Finding no support in the text of Section 2, the Florida Legislature turns to the historical argument that Sections 2 and 5 are linked because they were enacted together "as part of the Electoral Count Act of 1887," relating to the "count[ing of] electoral votes," Fla. Legis.Br.5 – an argument that is simply incorrect: Section 2 was enacted more than *four decades* before Section 5 (1845 versus 1887) as part of a bill entitled "An Act to Establish a Uniform Time for Holding Elections for Electors of President and Vice President in all the States of the Union." Act of Jan. 23, 1845, ch. 1, 5 Stat. 721. The function of Section 2 was simply to address the circumstance in which a winner failed to emerge (as when a required majority of the votes was not secured by any candidate) under an election held pursuant to 3

But, as history reveals, a Court that seeks to avoid some future crisis by abandoning the traditional rules of judicial restraint does so at its – and the nation's – peril.

U.S.C. § 1, which *was* enacted contemporaneously with Section 2. When Congress later enacted Section 5, it did not refer to Section 2 either explicitly or implicitly (compare 3 U.S.C. § 6 (referencing determination made under § 5), § 15 (explicitly cross-referencing § 5)) and, as noted above, the legislative history of Section 5 plainly shows that Congress regarded that statute as doing nothing more than providing a safe harbor from congressional challenge of electors.

Finally, petitioner's reference to the possibility of direct legislative appointment of electors by the Florida Legislature raises a host of constitutional issues. Further, it is not self-evident that such direct appointment is even available. Article II, § 1, cl. 4 empowers Congress to "determine the Time of chusing the Electors." In 3 U.S.C. § 1, Congress has set a uniform national date for this process, which in the year 2000 fell on November 7. There is no doubt that Florida *made* its choice on that date, although by a vote so close and under a counting process so flawed that the State's courts are still attempting to "ascertain[]," 3 U.S.C. § 6, what that choice was. Accordingly, any state legislative attempt simply to appoint electors after the fact would appear to be federally preempted. See U.S. Const. Art. VI.

III. THE FLORIDA SUPREME COURT'S DECISION COMPLIED WITH ART. II, § 1, cl. 2.

1. Petitioner would have this Court read Article II, § 1, cl. 2 as a command to every State that it either exclude both its judiciary and its executive from any role in pronouncing upon the meaning of the statutes through which its legislature "may direct" the appointment of presidential electors, or expressly delegate to them its constitutional duty to perform that task – ignoring the oddity of giving each State only this choice between extremes, and of ruling out the option every State appears to have chosen, in which courts and executives play their accustomed role of construing the legislature's handiwork. Far from promoting state accountability (Pet. Br. 37), petitioner's

approach would hinder the operation of state government and substantially increase federal interference in state affairs.

Indeed, petitioner's reading of Article II would have anomalous results: because Article II, § 1, cl. 2 pertains only to presidential elections, state court interpretive rulings would be invalid (under petitioner's view) only in that context. Yet state election codes are general statutes covering state and local as well as federal elections. Thus, petitioner's argument would lead to the impractical situation where the state election codes mean one thing for presidential elections and something else for all other elections, even when these events occur simultaneously. See Amici Br. of Haynes, *et al.* at 22 n.9. Compare *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), with U.S. Const. Amdt. XXVI.

Certainly, the history of Article II, § 1, cl. 2 lends no support to petitioner's binary version of that provision. That the Framers vested in state legislatures the authority to determine the manner of the appointment of presidential electors says nothing about whether state courts and other branches of state government are excluded altogether from their otherwise applicable state-law role in the lawmaking process. The unbroken history of state court involvement in election law interpretation, gubernatorial vetoes, and attorney general advisory opinions shows that Article II, § 1, cl. 2 does not exclude them from this role.

2. Faced with this reality, petitioner is forced to make two fatal concessions. First, he acknowledges that "[i]n some cases, there might be legitimate questions of state law arising from the implementation of a legislatively authorized scheme of appointing electors," and that in such circumstances state courts are authorized to answer those questions. Pet. Br. 48 n.22. Of course, that is precisely what happened in this case. The Florida Supreme Court engaged in routine, garden variety statutory interpretation. See Part I, *supra.*

Second, petitioner acknowledges that "[t]he Florida legislature *could* have delegated to state courts some authority over the manner [of] appointing electors." Pet. Br. 43; see also Amici Br. of Haynes, *et al.* at 14 n.6 ("To be sure, the Florida legislature can assign a role to the Florida Supreme Court.").

But that is precisely what the Florida Legislature has done. In fact, instead of delegating to the Florida courts the power of directly appointing presidential electors, the Florida Legislature has taken the much more modest – and entirely familiar – step of clearly and explicitly authorizing the Florida Supreme Court to interpret all of Florida law, including the Florida Election Code, and in doing so to reconcile inconsistencies, fill gaps, and perform all the traditional functions of judicial review. This judicial authority is recognized by statute, see Fla. Stat. § 20.02(1) ("The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws."), as well as by the Florida Constitution itself, Art. V, §§ 1, 3, 4, 5.[10] Tellingly, the Legislature has prohibited judicial review of certain election issues – *but not of any issues regarding presidential electors*. For example, the procedure for post-certification contests regarding state legislative elections expressly provides that "the jurisdiction to hear any contest of the election of a member to either house of the Legislature *is vested in the applicable house* * * * ." Fla. Stat. § 102.171 (emphasis added). Significantly, the state legislature has imposed no similar restriction with respect to judicial review of disputes involving presidential electors.[11]

[10] The Florida Legislature is authorized to propose amendments to the state constitution. Fla. Const. Art. XI, § 1. Article V, the provision governing the judicial branch and its jurisdiction, was proposed by S.J. Res. 53-D in 1971 and subsequently ratified.

[11] The Florida Legislature observes that "Florida has in place an election code for the resolution of disputes and a court system, including a supreme court, with all the usual judicial powers of such courts." Fla. Legis. Br. 9. The Florida Attorney General notes that the Florida election code is a general law, enacted by the legislature "knowing that under Florida's Constitutional and statutory scheme, such general laws are subject to judicial review." Fla. Atty. Gen. Br. 12. Moreover, the Florida Legislature reenacts its entire corpus of statutory law every two years. "The Legislature reenacts this statutory law knowing of the Florida courts' interpretation of it. Such periodic readoption indicates legislative acceptance of those interpretations."

Petitioner maintains that any legislative delegation of authority to courts with respect to elections must be "both clear and explicit." Pet. Br. 43. The delegation here is both, but in any event there is no textual, structural, or precedential support for any such demand. As a Senate report quoted by this Court opines, a legislature's power to delegate its authority under Article II, § 1, cl. 2 is not constitutionally suspect. See *McPherson* v. *Blacker*, 146 U.S. 1, 34-35 (1892) ("it is, no doubt, competent for the legislature to authorize the governor, *or the Supreme Court of the State*, or any other agent of its will, to appoint these electors" (emphasis added)). Where the Constitution restricts the branches to which state legislatures may delegate their federal duties, it achieves that result explicitly.[12]

Moreover, petitioner misapprehends the entire situation presented here: When a state legislature enacts an election code subject to judicial review, it is not *transferring* its Article II duty to select a manner of appointing electors; rather, it is *fulfilling* its duty to select a manner. In the instant case, involvement of the state judiciary is not an abdication of the legislature's power under Article II, § 1, cl. 2; it is an exercise of that power – because the power is itself merely the authority to pick a *process* – not necessarily the authority to determine an *outcome*. Indeed, 3 U.S.C. § 5 indicates on its face that Congress at least recognized the propriety of state judicial involvement as a method for resolving "any controversy or contest" regarding the appointment of presidential electors.

Petitioner claims that *McPherson* stands for the proposition that the state legislature's Article II power "'cannot be taken from them or modified by their State constitutions.'" Pet. Br. 47

Id. at 19.

[12] Thus, in the Seventeenth Amendment, the Constitution provides that, in the case of vacancies in the Senate, "the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." U.S. Const. Amdt. XVII.

(quoting *McPherson*). Even if that argument were right, it would be irrelevant here, for Florida's Legislature has itself made the Florida Election Code subject to judicial review. But petitioner's description of *McPherson* is incorrect. He fails to inform this Court that the quoted language appears in a section of the opinion describing the history of district appointment of electors, 146 U.S. at 35, and is taken from an 1874 Senate Report. The Court's *own* language in *McPherson* does not support petitioner's claim, which is why petitioner is forced to rely on an unacknowledged quotation from a Senate Report. And the state court cases cited by petitioner hold that state courts invoke state constitutions to constrain state legislatures even in the Article II, § 1, cl. 2 context.[13] In fact, *McPherson* clearly contemplates a state judicial role in adjudicating controversies over the appointment of electors. Petitioner himself cites *McPherson* for the proposition that the method of electoral appointment "raise[s] a 'judicial question,' subject to judicial orders." Pet. Br. at 36 (quoting *McPherson*, 146 U.S. at 24). Indeed, *McPherson* not only endorsed the Michigan Supreme Court's power to decide that Michigan's statutory electoral scheme was valid "under the state constitution and laws," but also remarked that the U.S. Supreme Court is "*not authorized* to revise the conclusions of the state court on *these matters of local law*." *McPherson,* 146 U.S. at 23 (emphasis added). The other cases cited by petitioner similarly contemplate a state judicial role in interpreting election statutes.[14]

[13] See, *e.g.*, *In re Opinion of the Justices*, 107 A. 705, 706-07 (Me. 1919) ("[T]he state by its legislative direction may establish such a method of choosing its presidential electors * * * ; but the legislative acts both of establishment and of change must always be subject to the provisions of the Constitution of the state in force at the time such acts are passed and can be valid and effective only when enacted in compliance therewith.").

[14] See *State ex rel. Beeson* v. *Marsh*, 34 N.W.2d 279, 282-84 (Neb. 1948); *McLendon* v. *Slater*, 554 P.2d 774, 778-81 (Okla. 1976). The reliance by petitioner's amici Haynes, *et al.*, on *Case of Electoral College*, 8 F. Cas. 427 (C.C.D.S.C. 1876), is highly questionable in light of the holding of *Fitzgerald* v. *Green*, 134 U.S. 377, 379 (1890), that electors for president and vice

The conclusion that the state court played a constitutionally appropriate role is fortified by a special feature of the text of Article II, § 1, cl. 2. Unlike Article V, Article I, § 4 and the pre-Seventeenth Amendment Article I, Article II, § 1, cl. 2 gives the power to pick electors *not* directly to state legislatures, but rather to the "State[s]," using "such Manner" as the "Legislature * * * may direct." The subject of the sentence is the "State," unlike other constitutional clauses which give power and responsibility to state legislatures as such. Even with respect to Article I, § 4, cl. 1, however, this Court has found that the assignment to state legislatures of the federal duty and authority to prescribe the "Manner" of congressional elections does not exclude state governors, courts, and other bodies with state lawmaking responsibilities. See *Growe* v. *Emison*, 507 U.S. 25, 34 (1993); *Smiley* v. *Holm*, 285 U.S. 355, 372 (1932); *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 569 (1916).[15]

In sum, once a state legislature has enacted an election code and has entrusted the state courts with the authority to engage in its statutory interpretation, the State has satisfied Article II, § 1, cl. 2.[16]

president are state officers.

[15] *U.S. Term Limits* v. *Thornton*, 514 U.S. 779 (1995) (cited at Pet. Br. 39, 40, 43), in fact supports respondents. In *Term Limits*, this Court noted that the state's "duty" to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives" under Article I, § 4, "parallels the duty under Article II that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.'" *Id.* at 804-05. Hence, *Term Limits* underscores the relevance of *Growe*, *Smiley* and *Hildebrant* in the context of Art. II, § 1, cl. 2.

[16] Any further constitutional constraints on the ability of a state court to decide a particular presidential election case in one way rather than another would have to be located, it would seem, not in Article II, § 1, cl. 2, but in some other source of law – either in a different federal constitutional guarantee, such as the Republican Form of Government Clause, or in state law. If Article II, § 1, cl. 2 did embody some kind of check to ensure that, in extreme cases, a state court did not unilaterally seize the legislature's power – by, for example, itself directly naming the state's presidential electors with

CONCLUSION

The judgment should be affirmed.

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no colorable statutory basis for doing so – the check would surely not resemble the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989), or any of the various formulations proposed by petitioner's amici. See Amici Br. of Haynes, *et al.* at 23 n.10 ("grievously wrong" or "merely erroneous"). Instead, the check would resemble a standard more deferential to state courts. See n.4, *supra*.

November 30, 2000
Reply Brief of Respondents by George W. Bush

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

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2 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1966) 7
1 Dec. 1803, Annals 13:129, *reprinted in* 5 FOUNDERS' CONST. 1

REPLY BRIEF FOR PETITIONER

The arguments advanced to this Court by respondents depend upon minimizing into insignificance the meaning of Article II, §1, cl. 2 of the Constitution, 3 U.S.C. § 5, and the effect of the post-election revision of Florida election law by the Florida Supreme Court. If respondents are correct, the constitutional delegation to state legislatures of the power to determine the manner in which presidential electors are appointed, and Congress's effort to provide a means by which a State's selection of electors will be determined in a timely and conclusive manner according to rules and procedures adopted before the election, may easily be circumvented. The predictable consequence will be post-election chaos, turmoil, litigation and uncertainty whenever a state court changes the law for ascertaining the results of an election in the midst of that post-election process. Every close presidential election will be transformed into a litigation circus, the outcome of which will be determined in substantial part by state court changes in election laws "passed for the occasion." 1 Dec. 1803, Annals 13:129 (reprinted in 5 FOUNDERS' CONST. at 453).

I. Respondents' Efforts To Recharacterize The Decision Below Cannot Withstand Scrutiny

Respondents' lengthy and tortured efforts to recharacterize the decision below as a modest, hardly noticeable, garden-variety act of ordinary statutory interpretation fail to withstand the mildest scrutiny.[1]

[1] Respondents contend that the Florida Supreme Court's revision of Florida election law is impervious to any review by this Court. Gore Br. 1; Butterworth Br. 8-9. Where, however, the resolution of a federal question turns on whether a state tribunal adopted a new rule of law to the detriment of the federal petitioner, this Court has not hesitated to examine the decision in light of preexisting state law. *See*

First, the Florida Supreme Court plainly rewrote the election laws in a number of significant respects. *See* Harris Br. 11-20. Its decision was as far removed as it could be from a "garden variety" statutory interpretation. Gore Br. 1. In fact, while the court seasoned its opinion with discussions of canons of statutory construction, even the court acknowledged that it was changing, not construing, the law. Throughout its opinion, the court repeatedly stressed that it would not be bound by "technical statutory requirements" (Pet. App. 36a), but would use its "equitable powers," *id.* at 37a, to be guided by "the will of the people," *id.* at 8a, "to reach the result that reflects the will of the voters," *id.* at 10a, and to ascertain not the meaning of a statute but the "will of the electors," *id.* at 36a. The court plainly understood that its decision changed the meaning of clear statutory provisions in a manner that could affect the outcome of the election (and will, presumably, apply to future elections).

Respondents' efforts to rationalize what the court below actually did are most transparent in their argument that the court was doing nothing other than resolving a purported "conflict between one provision [§ 102.111] saying that counties filing returns after seven days 'shall' be ignored and another [§ 102.112] saying that returns filed past the deadline 'may' be ignored." Gore Br. 14. Petitioner has already demon-

Pet. Br. 20; *General Motors Corp. v. Romein*, 503 U.S. 181, 187-88 (1992); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958). Indeed, in *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964), this Court exercised independent judgment to determine whether a state supreme court's "construction unexpectedly broaden[ed] a [criminal] statute which on its face had been definite and precise." Such an "unforeseeable state-court construction," the Court held, violated the defendant's due process right to fair notice by retroactively changing the law. *Id.* at 354-355.

strated the fallacy of that contention. Pet. Br. 22-25 & n.6, 45-46; *see also* Harris Br. 16-18 & n.13. Whatever "reconciliation" may be appropriate between the mandatory and permissive non-inclusion of returns submitted after the deadline, no conceivable manipulation of those provisions could have led to the conclusion that the Secretary "shall accept" such returns.

Respondents' assertion that the mandatory statutory deadline of 5 p.m. on the 7th day after the election, which is contained in equally forceful language in both § 102.111 and § 102.112, conflicts with the counties' discretionary power to grant requests for manual recounts (§ 102.166) "because in many cases a full manual recount simply cannot be completed by 5:00 p.m. on the seventh day following the election," is equally indefensible. Gore Br. 14. The Florida legislature was undoubtedly aware of this potential conflict, since it adopted the recount provision at the same time it reiterated the requirement that counties "must" file their returns within seven days of the election. *See* Fla. Laws 1989, c. 89-338 §30, c. 89-348 §15. Moreover, any perceived conflict is wholly illusory, since the decision to initiate a manual recount is wholly discretionary. *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508, 509 (Fla. App. 1992). If a county board believes it cannot make the legislative time limit for submitting its returns, it need not conduct the recount. And, if a county board chooses to conduct a recount, the legislature has directed that "[t]he county canvassing board *shall appoint as many counting teams* of at least two electors *as is necessary* to manually recount the ballots" (Fla. Stat. § 102.166(7)(a) (emphases added))—presumably to enable the county to meet the deadline. If it fails to complete the recount by the deadline, § 102.112 provides that the Secretary "may … ignore[]" untimely returns. *See* Pet. Br. 22 & n.6.

Respondents—like the court below—close their eyes to the fact that the setting of deadlines constitutes a

balancing of numerous factors and is an inherently legislative task. Here, for example, the Florida legislature had to strike a balance between potentially lengthy recount proceedings, an appropriate period for protests, a suitable period for judicially conducted contests with potential appeals, and the need for finality in the context of the deadlines that apply to a presidential election. It balanced those factors and decided on a seven-day window after the election for protests and limited recounts and twenty-eight days or so for any potential contests. To be sure, such deadlines are "inherently arbitrary," but fixed dates "are often essential to accomplish necessary results." *United States v. Boyle*, 469 U.S. 241, 249 (1985). That is particularly true in the context of presidential elections, where federal law fixes precise deadlines for the appointment of electors because the need for finality has significance for the entire nation. *See* 3 U.S.C. §§ 5, 7. The simple truth is that the Florida legislature established clear, unambiguous and sensible statutory deadlines enforceable by the Secretary of State. The Florida Supreme Court revoked those deadlines and essentially terminated the Secretary's statutorily granted authority.

Second, the Florida Supreme Court also decided to create, out of whole cloth, a new deadline for a selective, standardless, changing and unequal manual recount process for this particular election—an "equitable" decree completely untethered to any legislative judgment. *See* Pet. App. 37a. Having determined to abandon the statutory November 14 deadline, the court was forced to devise another date to ensure some semblance of finality. At oral argument in the court below, one of the justices asked, "Are we just going to reach up [for] some inspiration and put it down in paper?" Unofficial Tr. of Oral Arg. 14. Since respondents' counsel could offer no alternative date, the court apparently did reach somewhere for inspiration and settled on 5:00 p.m. on Sunday, November 26. Pet. App. 38a. Respondents make no effort to contend that the deadline devised by the

court below is not a new rule adopted for purposes of this election.

The court's equitable decree divining a new deadline to fulfill its vision of the will of the electorate did not just substitute one arbitrary deadline for another. The court's ruling also had the effect of substantially shortening the legislatively decreed time for post-certification contests to the election results (assuming *arguendo* that such contests are even permissible in this context). Once the results were finally certified on November 26, respondent Gore filed a contest to the election. Under Florida law, the defendant(s) must respond, Fla. Stat. § 102.168(6), and defend the certified outcome in full judicial proceedings, including discovery, trial, and appeals. *See*, *e.g.*, *Bolden v. Potter*, 452 So. 2d 564, 565-66 (Fla. 1984). In light of the federal deadline for the appointment of electors, the court's extension of the certification deadline has dramatically compressed the time for efforts to contest the election and, most significantly, for defending against such efforts.

The partisan struggle in Florida today is precisely the kind of chaotic situation that would have been avoided by adherence to the statutory deadline. The Florida Supreme Court's willingness to fashion new rules of law for this election has cast the election into turmoil and prolonged a dispute that should have been avoided. The court's revision of Florida election law, which is inconsistent with Article II and incompatible with Florida's implementation of 3 U.S.C. § 5, should be set aside so that the presidential election can achieve lawful finality.

II. The Decision Below Cannot Be Reconciled With Article II

As previously explained (Pet. Br. 36-50), the Florida Supreme Court's equitable reworking of Florida's statutory electoral scheme cannot be reconciled with Article II, § 1, cl. 2 of the Constitution, which provides that

electors shall be appointed "in such Manner as the [state] Legislature . . . may direct." Respondents have failed to justify the post-election judicial revision of the Legislature's direction as to how Florida's electors are to be appointed.[2]

The Gore respondents contend that "Article II's command is directed to the States *qua* States." Gore Br. 34-35. That assertion is incorrect. Article II does vest the authority to *appoint* electors in "Each State." However, the Constitution vests the authority to "direct" the "Manner" of appointing electors in each State in "the Legislature thereof." As petitioner has already established (Pet. Br. 41-43), this distinction is of constitutional significance. Where the Framers intended to vest authority in the States as such, they said so. But where they wanted to specify an organ of state government to perform a function (or carry out a responsibility), they *also* said so. Where the Constitution spells out the agency of the State that is assigned a particular function, fulfillment of the constitutional design requires that such a designation be afforded legal meaning.

[2] The Gore respondents suggest that "this claim may not be properly before the Court." Gore Br. 33. That suggestion, tentative though it is, is unwarranted. Petitioner argued below that Article II of the Constitution "provides that the *legislatures* of the States will prescribe the manner in which presidential electors are chosen," and that it would "violate federal law for the state *courts* to use equitable doctrines to supplement the *legislature*'s judgment, reflected in the statutes of the state, regarding the methods and time limits for selecting presidential electors." Pet. App. 62a-63a n.15. This was sufficient to put the Florida Supreme Court on notice of precisely the claim presented in this Court: That the court would (and, ultimately, did) exceed its constitutional authority if it were to supplant the legislature's directives regarding the manner of appointing electors with its own. *See, e.g.*, *Nelson v. Adams USA, Inc.*, 120 S. Ct. 1579, 1586 (2000); *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935).

Relying primarily on *Smiley v. Holm*, 285 U.S. 355 (1932), respondents assert that state statutes governing the appointment of electors "have always been subject to state law processes including state judicial review and gubernatorial veto." Gore Br. 36; *see also* Butterworth Br. 14-15. *Smiley* held that a state governor could participate through the veto power in the enactment of electoral legislation; it did not address, nor has this Court *ever* addressed, the authority of a state *court* to revise laws relating to presidential elections enacted under Article II. The distinction is significant, because the Framers anticipated participation by the executive branch (through the veto power) in the legislative process, but specifically *rejected* any involvement of the judiciary in that process. *Compare* U.S. CONST. art. I, §7, cl. 2, *with* 1 *The Records of the Federal Convention of 1787* 21 (Max Farrand ed., 1966), 2 Farrand 75 (Framers rejected proposal for "council of revision," comprised partly of judges, with power to nullify legislation). As explained earlier, the Framers contemplated various means by which electors might be selected in their lengthy consideration of this subject; the one alternative that was roundly rejected was that the selection be lodged with the state judiciary. Pet. Br. 38.

Smiley actually supports petitioner, not respondents. This Court in *Smiley* made clear that the constitutional delegation to state legislatures to regulate the "manner" of congressional elections (under Art. I, §4) involves "lawmaking." 285 U.S. at 366. Because, under the state constitution there involved, the governor had a role in the "lawmaking" function (*i.e.*, the veto power), his exercise of that role was constitutional. *Id.* at 368; *see also State ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568-69 (1916) (sustaining use of referendum in respect of congressional election because state constitution allowed "lawmaking" through referendum). In Florida, however, the judiciary does *not* have a role in the "lawmaking" process. FLA. CONST. art. II, §3; Fla. Stat. §20.02; *see Burdick v. State*, 594 So. 2d 267, 270 n.8 (Fla. 1992)

("Clearly this Court's role is to interpret, not to legislate. Accordingly, we can do no more than point out what appears to us to be a serious inconsistency between the two statutory . . . schemes"). Thus, the state supreme court's revision of Florida's duly enacted legislation, in contravention of the restrictions imposed on it under the state constitution, is the opposite of the situation presented in *Smiley*.[3]

In short, the problem with respondents' approach to Article II is the applicability of the general principle they discuss to the circumstances of this case. Despite their effort to clothe the decision below in benign coloration, that court materially revised the manner of appointing Florida's electors. This was not the formal and authorized participation in the process considered in *Smiley*, but the usurpation of power, however well intended, by the judiciary from the legislature—the specific branch of state government entrusted by the Constitution to perform this function.[4]

The Gore respondents concede (as, indeed, they must) that "[i]f the state supreme court or Governor decided to pick electors on its own, in disregard of state law, that would violate the Constitution." Gore Br. 37

[3] Moreover, *Smiley* involved redistricting rather than a direct regulation of elections. The apportionment of legislative districts is committed to the States *qua* States by Article I, Section 2. *See Growe v. Emison*, 507 U.S. 25, 34 (1993). For this reason, the Gore respondents' attempted reliance on *Growe*'s approval of state-court involvement in this area (*see* Gore Br. 38) is also misplaced.

[4] Respondent Butterworth actually insists (Br. 17-18) that the state judiciary wields power over elections, including the adjustment of deadlines, that is "wholly independent" of the legislature. While the exercise of such authority might be permissible under state law in elections for state officers, it is clearly not authorized by Article II in presidential elections. The court below apparently overlooked this point

n.24. But *that* is very close to the reality of what happened in this case. The Florida Supreme Court, by unilaterally altering the statutory deadlines for certifying election returns, authorizing extended manual recounts in selected counties, and changing the circumstances under which recounts can be considered, altered the "manner" of appointing electors. The state supreme court here arrogated to itself a power—the power to "direct" the "manner" in which electors will be selected—reserved by our Constitution exclusively to the legislature. *See McPherson v. Blacker*, 146 U.S. 1, 27 (1892).[5] That unauthorized exercise of constitutionally delegated power cannot escape this Court's scrutiny through the simple expedient of labeling it "judicial review."[6]

Finally, the Gore respondents refute an argument not made by petitioner, asserting that the separation of powers is generally not mandatory on the States. Gore Br. 42. As a general proposition, that is unexceptionable. In this context, however, the Constitution specifically assigns the power to determine the manner of appointing presidential electors to the state legislature, not to the State. The Constitution thus, in this instance, does select a specific agency of state government in which to repose this authority. Moreover, petitioner has not argued that the Florida legislature cannot constitutionally

[5] Petitioner notes that a citation to *McPherson* in the opening brief (at 47) inadvertently omitted the fact that the Court was quoting, with approval, from an 1874 Senate Report on the subject of the Electoral College.

[6] For this reason, the Gore respondents' lengthy recitations of judicial and administrative interpretations of state election laws (Gore Br. 39-41 & nn.28-30), as well as their observation that state courts can adjudicate violations of election laws (*id.* at 43-44), are completely irrelevant. Petitioner has never contended that state courts, or executive officers, are precluded by Article II from construing laws relating to elections.

grant authority to the judiciary where it has explicitly chosen to do so. *See* Pet. Br. 43. Petitioner's point is that the Florida legislature *has not* done so; and in the absence of an express grant of the authority reserved to the legislature by the Constitution, the state supreme court was constitutionally prohibited from exercising that authority of its own volition.

III. The Judgment Below Should Be Vacated Because It Does Not Comply With 3 U.S.C. § 5

A. The Decision Below Fails To Comply With § 5

Section 5 is much more simple, straightforward and functional than respondents have described. It provides an opportunity for States, if they enact pre-election laws providing for the determination of controversies concerning the appointment of electors, and if they resolve such controversies pursuant to such laws in a timely manner, to ensure that the State's determination "shall be conclusive, and shall govern in the counting of the electoral votes." Florida did enact such laws and was in the midst of ascertaining the results of its election pursuant to those laws when the Florida Supreme Court, exercising its equitable powers, rewrote Florida's laws for determining election controversies, enjoined the state executive from complying with those laws, and changed various deadlines and dispute resolution procedures. That intervention violated Article II and jeopardized the State's (and petitioner's) right to the conclusive effect accorded by §5. The judgment below is, therefore, a nullity.

Respondents' characterization of petitioner's argument concerning the effect of § 5 and respondents' rendition of § 5's legislative history are wide of the mark. It is true that States are not required to adopt election laws as contemplated by § 5. But if they do not do so, they run the risk of the uncertainty and confusion regarding the appointment of their electors that is occur-

garding the appointment of their electors that is occurring in Florida today.

Florida *did*, however, adopt laws designed to ensure that the State, its voters, and its electors would receive the due process, finality and conclusiveness that § 5 promises. And Florida was in the process of resolving disputes and certifying its electors in accordance with § 5 when the Florida Supreme Court *sua sponte* issued an injunction to stop that process dead in its tracks ten days after the election and, four days later, rewrote the law that embodied Florida's attempt to comply with and gain the benefits of § 5. If that intervention is sustained, Florida and its voters face a risk that they will not obtain the benefits of § 5. If it is a nullity, as petitioner contends, this Court can restore the order to Florida's election that its legislature endeavored to give it pursuant to Article II and § 5.

There is no dispute that one purpose of § 5 is to ensure that determinations of controversies over electors will govern in the counting of electoral votes. Where respondents err is in asserting that the legislative history reveals "that the statute's *only* purpose and effect is to provide the States with a way to guarantee that a State's electors will not be subject to challenge in Congress at the time the electors' votes are tabulated pursuant to the Twelfth Amendment." Gore Br. 23 (emphasis added). Both the text and the legislative history of § 5 make plain that any state court decision resolving a controversy over the appointment of electors on the basis of a new rule of law that had not been enacted prior to the election does not receive the binding and conclusive effect accorded when § 5 is complied with.

Section 5 expressly provides that determinations by state tribunals regarding disputes over presidential electors will have two consequences if they comply with the requirements of § 5: First, such determinations "shall be conclusive," and second, they "shall govern in the counting of electoral votes." 3 U.S.C. §5. Respon-

dents' interpretation of § 5 effectively reads the first of these consequences out of the statute. In respondents' view, the *sole* and *exclusive* effect of compliance with § 5 is that the state tribunal's determination "shall govern in the counting of electoral votes"; the separate allowance of "conclusive" effect is wholly superfluous. Respondents' interpretation is thus irreconcilable with "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village Inc.*, 503 U.S. 30, 36 (1992).

By declaring that only those state court determinations complying with §5 would be "conclusive," Congress made clear that § 5 is not aimed solely at determining which electoral votes "shall govern in the counting." Instead, §5 also addresses the broader question of the types of state court determinations that will receive "conclusive" effect in the process of certifying electoral votes from a State. In order to avoid any incentive for the type of *post hoc* judicial legislation at issue in this case, Congress decided that a state tribunal's resolution of controversies or contests concerning the appointment of electors would not bind the parties and state officials involved, unless such determinations were made "pursuant to" the law as enacted prior to election day. Only this reading of § 5 gives independent meaning to the two distinct phrases contained in the statute—"shall be conclusive" and "shall govern in the counting."

The error in the Gore respondents' interpretation of § 5 is confirmed by the structural relationship between § 5 and 3 U.S.C. § 15. Section 15 sets forth procedures for Congress to follow in determining whether to count a given set of electors from a State. As previously explained (Pet. Br. 31), in some circumstances §15 requires Congress to count disputed electoral votes in accordance with the certification of the state executive. *See* 3 U.S.C. § 15 (if the Senate and House disagree over multiple electoral vote returns from a State, "the votes of

the electors whose appointment shall have been certified by the executive of the State, under seal thereof, shall be counted"). If state courts were permitted to fashion new rules of law and apply them retroactively to change the results of a presidential election, and were further permitted to compel state executive branch officials to certify election results in compliance with that act of *post hoc* judicial legislation, such state court decisions could govern in the counting of electoral votes despite Congress's express determination in § 5 that judicial determinations of that nature must *not* be given binding effect. Only petitioner's reading of § 5 avoids this irreconcilable conflict between the provisions of § 5 and § 15 by making clear that judicial decisions in violation of the requirements of § 5 are not "conclusive" and thus do not bind state executive officials in the performance of their legislatively conferred responsibilities.

The Gore respondents also contend (Gore Br. 31-33) that because the state supreme court itself was in existence prior to election day and empowered to settle election controversies, § 5 was satisfied. That contention is would make § 5 a virtual nullity. Section 5 requires that the tribunal's determination be made "pursuant to" the "laws enacted prior to" election day. This statutory requirement refutes any implication that courts can comply with § 5 while invoking their equitable powers to decree new election rules in contravention of plain statutory text. *See* Pet. Br. 26. By overriding the clear legislative directives imposing a November 14 deadline on the submission of county election returns and by crafting a new twelve-day extension through its *equitable* powers, the Florida Supreme Court failed to satisfy § 5.

This post-election departure plainly contravenes the purpose of §5's requirement that disputes be resolved pursuant to laws enacted prior to the election, not under post-election rules of procedure and dispute resolution crafted with full knowledge of their potential effect on the outcome of a disputed presidential election. The leg-

islative history clearly reveals Congress's concern with ensuring that the rules governing election contests would be enacted prior to the election:

> In my judgment it would be wise if it could be provided that these contests should be decided under and by virtue of laws made prior to the exigency under which they arose, made prior to the existence of the particular contest to be decided. . . . *I think that it would be wise if the contest should be made in the face of existing law rather than that the law should be made in the face of the existing contest*.

18 CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper) (emphasis added).[7]

Representative Herbert echoed this same sentiment and presciently explained the danger in invoking new legal rules to resolve a dispute over presidential electors:

> The country never will be satisfied in any political case with a temporary expedient or device under a law passed at the moment, after parties had taken sides on the question. The party losing under such circumstances will naturally believe it has been cheated. The people of this country are law-loving and law-abiding, but they want laws passed before cases arise, and not with reference to any special case that may have arisen.

18 CONG. REC. 75 (Dec. 9, 1886).[8]

[7] Representative Cooper's comments were made in response to a minority objection to the inclusion of the provision that disputes between contending electors should be settled pursuant to the "laws enacted prior to" election day. 18 CONG. REC. 47. Notably, the Gore respondents' many citations to the legislative history behind 3 U.S.C. §5 do not involve this crucial aspect of the statute, let alone undermine this clear evidence of Congress's intent.

Nothing in the legislative history cited by the Gore respondents answers this primary point. Congress did not intend state courts to be free to change the rules after a presidential election and then impose those newly fashioned rules on the executive branch officials charged with certifying the election results. That is particularly true where, as here, such a state court decision threatens to nullify the legislature's decision (in the exercise of its exclusive authority under Article II) to claim for the State the benefits of compliance with § 5.

Respondents also err in suggesting (Gore Br. 28-30) that applying § 5 in accordance with its terms would raise serious constitutional questions. Respondents' Article II concerns are wholly misplaced. As discussed elsewhere (Pet. Br. 36-39; Part II, *supra*), Article II vests in the state *legislature*, not the state supreme court, the power to determine the manner of appointing electors. Applying § 5 to prevent state courts from adopting new retroactive rules that were not enacted by the legislature, and which undermine a State's ability to select its electors, hardly conflicts with Article II. To the contrary, § 5 advances the constitutional interests expressed in Article II by ensuring that the *legislature*, rather than state courts or other tribunals, determines the manner of appointing presidential electors.[9]

[8] Ironically, Representative Herbert compared the people's interest in having disputes resolved under pre-set laws with the proper judicial role of interpreting the law as enacted: "Like the upright judge, when he is compelled to decide what his conscience does not approve, he says: 'This, indeed, is very hard, *but so the law is written.*' And therefore it is that an unjust law, an imperfect law, is better than no law at all. *Let the people know beforehand what the law is and what they are to expect*." 18 CONG. REC. 75 (emphases added).

[9] An interpretation of § 5 that purported to limit the *legislature*'s authority to enact post-election legislation regarding the appointment of electors might raise constitutional questions under Article II, but no such issue is presented in

Respondents' federalism argument is equally without merit, as it rests on an inaccurate caricature of petitioner's arguments. Petitioner nowhere contends that § 5 "preclude[s] judicial involvement in state election disputes." Gore Br. 29-30. Petitioner's point is simply that where, as here, a state supreme court has adopted a new rule and attempted to apply it retroactively to affect the results of a presidential election, the court's decision is not binding on either the Congress or state election officials.

B. This Court Should Vacate The Lower Court's Decision In Order To Vindicate The Federal Mechanism In 3 U.S.C. § 5

Respondents' mistaken reading of § 5 drives their inadequate response to the specific question posed by this Court: What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5? The Gore respondents brush aside that question in a single paragraph. Gore Br. 30-31.

According to the Gore respondents, this Court *cannot* vacate the judgment below, even if the Court concludes that the Florida Supreme Court's decision is inconsistent with the requirements of § 5. As shown above, that argument ignores the substance of § 5; moreover, it ignores the effects that the judgment below has had and may continue to have on state officials attempting to perform their role in presidential elections. *See* Pet. Br. 32-36.

Florida, through its legislature and consistent with Article II, has created a system whereby officers of Florida's executive branch are authorized to act to secure for Florida the advantages of § 5: That "*its* final determination" according to laws enacted before the election—not

tions under Article II, but no such issue is presented in this case.

the determination of some other entity—shall be "conclusive" and shall "govern in the counting of the electoral votes." Actions by the responsible state officials to perform their duties under §5 cannot be overthrown by the state court, whether or not its ruling is correct as a matter of state law. *E.g.*, *California v. Superior Court*, 482 U.S. 400 (1987) (state supreme court reversed for attempting to prevent state executive from performing duties under federal statute). That the court below purported to base its decision on state law does not shield it from review (or reversal) by this Court when important federal interests are at stake. *See*, *e.g.*, *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (reversing attempt by state supreme court to enforce state law on grounds that state law would impair substantial federal interest); *see also* Pet. Br. 31-32 & n.10.

Moreover, the Court has made clear that when a state court decision is predicated on an erroneous understanding of federal law, the normal course is to vacate that decision and remand for further consideration in light of a proper understanding of federal law. *Three Affiliated Tribes v. Wold Engineering, Inc.*, 467 U.S. 138, 152 (1984); *see also United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 632 (1973). Thus, even if the Gore respondents are correct that §5 merely provides a "safe harbor" where the election laws are not changed after election day, it is plain both that the Florida court was concerned that its actions comport with Title III and that it did not understand that its decision might jeopardize such a "safe harbor." *E.g.*, Pet. App. 32a & n.55. Whether or not there has been a change in law under §5 is a federal question, and, if the Florida court was incorrect in its understanding of federal law, in light of the impending time constraints, this Court should simply vacate the decision below to rectify that error.

It would defeat §5's very purpose to hold, as respondents urge, that *only* Congress can enforce the statute. That argument would have the perverse effect of

largely rendering § 5 a nullity in precisely those cases—close, contested elections—in which Congress clearly intended § 5 to have the most force. As the Gore respondents acknowledge, the presidential election of 1876, in which Congress had to resolve the conflicting claims of multiple sets of electors, pushed the Nation toward the brink of a "renewed civil war." Gore Br. 23. In the wake of this grave threat to the country's political stability, "Congress recognized that … it was essential to take 'this question out of the political cauldron.'" Gore Br. 23-24 n.14 (quoting 15 CONG. REC. 5079 (June 12, 1884) (statement of Rep. Browne)). Section 5 embodies the congressional mechanism for ensuring that in a close election, state tribunals are authorized to act to determine electors with fairness and finality and with reference to pre-existing rules, so that Congress will only rarely be compelled to exercise its ultimate authority to determine which electors are valid. Yet under the Gore respondents' minimalist interpretation, § 5 would simply return the question of contested electors to "the political cauldron" of Congress, even where a state legislature has complied with the statute to obtain for its constituents the benefits of § 5—as Florida's had done here, before the court below intervened. The statute should not be interpreted to require that self-defeating result.

The court below failed to comply with § 5; this Court should vacate the judgment below in order to preserve the federal statutory system and to provide the certainty and finality for presidential elections that Congress intended.

C. The Decision Below Violates Due Process

As 3 U.S.C. § 5 demonstrates, Congress has decided that in the election context *in particular*, retroactive new rules are fundamentally and unacceptably unfair—reinforcing the Due Process Clause's general concern for fundamental fairness and adequate notice. *See* U.S.

CONST. amend. XIV §§ 1, 5. The Gore respondents argue that the new election procedures announced by the court below are factually distinct from the new vote-counting rule found to be unconstitutional in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). Gore Br. 45. But here, as in *Roe*, ballots that would *not* have been counted as lawful votes under the rules in place on election day may have their legal status changed as a result of the new timetable, as a direct conseuence of selective, subjective, standardless and shifting methods of manual vote recounting and as a result of the Gore respondents' recent, tactical embrace of "dimpled" ballots. Pet. Br. 33 & n.12. Such post-election changes violate due process. *See* Alabama Br. 13-28.

IV. Petitioner's Claims Are Clearly Justiciable

Amici Florida Senate and House contend that compliance with 3 U.S.C. § 5 is a nonjusticiable political question properly resolved by the Florida legislature or Congress. *Amici* Br. 4. That claim is misplaced. This case presents precisely the sort of "judicial question" this Court decided in *McPherson v. Blacker*, 146 U.S. 1, 23 (1892), and numerous other cases that happen to arise in a political context. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) ("The doctrine . . . is one of 'political questions,' not one of 'political cases.'").

There is no "textually demonstrable constitutional commitment of the issue to a coordinate political department," nor is there "a lack of judicially discoverable and manageable standards for resolving" the issues under either 3 U.S.C. § 5 or Article II, § 1. *Baker v. Carr*, 369 U.S. at 217. To the extent that a determination under either provision tangentially *relates* to a constitutional function that may be performed by Congress or the Florida legislature, such an attenuated connection does not preclude judicial review. *See*, *e.g.*, *Roudebush v. Hartke*, 405 U.S. 15 (1972); *Powell v. McCormack*,

395 U.S. 486 (1969); *Moore v. Oglivie*, 394 U.S. 814 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968).

Perhaps the most significant result of a ruling for petitioner in this case would be to clarify the governing federal law standards and thereby avoid a potential constitutional crisis. By making clear in this case the unwarranted nature of the Florida Supreme Court's intrusion into the legislatively mandated process for appointing electors, this Court will eliminate the potential for an unseemly conflict between Florida's legislative and judicial branches regarding the appointment of electors.

Moreover, the fact that other governmental entities, such as the Florida legislature and Congress, may review the issue—and may have other means of remedying violations of Article II and §5—does not render these issues nonjusticiable. In *McPherson*, 146 U.S. at 23, this Court exercised jurisdiction over a challenge to Michigan's statutory scheme for appointing electors, even though (as the Michigan Secretary of State argued) state or federal actors might later have adjudicated the same questions in the exercise of their respective authorities. *See also Foster v. Love*, 522 U.S. 67 (1997) (congressional power to judge elections and qualifications of members did not foreclose Court's review of Louisiana election scheme). Consequently, the fact that the state legislature and the Congress might address issues involved in the appointment of Florida's electors in no way precludes this Court from exercising jurisdiction over the present controversy.

CONCLUSION

The judgment of the Supreme Court of Florida should be vacated.

Respectfully submitted.

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No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

Reply Brief of Respondents Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission

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ARGUMENT

I

THE SUPREME COURT OF FLORIDA DID MORE THAN INTERPRET THE LAW; IT CHANGED THE LAW

The threshold issue before this Court is whether the Supreme Court of Florida's decision changed the law on November 21 from what it was on election day, November 7. Arguments raised in support of the decision follow this logic line: (i) a state supreme court is the final arbiter of state law; (ii) the interpretation of state statutes is a matter of state law; (iii) the decision below was an "interpretation" of the Florida Election Code; (iv) an interpretation of the law is not a change in that law; and therefore, (v) there is no conflict with federal law, and no basis for this Court to review the decision of the Supreme Court of Florida. *See, e.g.,* Gore Respondents Br. at 13-21; Attorney General ("A.G.") Br. at 4-10; Palm Beach Br. at 6-10.

The Commission Respondents do not contest, and in fact embrace, the first two of these points. The logical flow dissembles, however, with the use of the word "interpretation" in the third point. All can agree that courts may interpret laws; indeed, that is their job. However, the decision below was not an "interpretation" — it was the creation of new principles of Florida law, drawn from equitable precepts and unfettered by "hypertechnical compliance with statutes." Bush Pet. App. at 36a. While the court's opinion starts with a discussion of statutory construction, it then departs from the statutory scheme "to reach the result that reflects the will of the voters, whatever that might be." Bush Pet. App. at 9a-10a. The court concludes that it had to invoke its "equitable power . . . to fashion a remedy . . ." to further Florida constitutional principles. Bush Pet. App. at 37a. Thus, as is clear from the opinion, the action taken by the Supreme Court of Florida was not an interpretation, but the creation of new Florida law. The third point in the line of logic is thus incorrect, and the fourth and fifth points fall of their own weight.

The position that the court engaged in "ordinary judging," using "garden variety" principles of statutory construction is untenable. Gore Respondents Br. at 13 ("The decision by the Florida Supreme Court was an ordinary exercise in statutory interpretation. . . ."); Palm Beach Br. at 10 ("What the Supreme Court of Florida did was not legislative, it was ordinary judging."). The decision was anything but ordinary. The court did not limit itself to interpreting the Florida Election Code. Rather, guided by the Florida Constitution and equitable principles, and denouncing "hypertechnical compliance" with the statutory requirements, the court went well beyond the text of the statute and created new legal rights, rewrote statutory deadlines, and created new criteria for making administrative determinations on election issues.[1]

For example, the court purported to resolve a conflict between section 102.112 (which provides that election results from the county canvassing board *may be ignored* if not filed by the statutory deadline) and section 102.111 (which states that the Commission *shall ignore* such returns) by holding that the Secretary *must accept* untimely election returns unless doing so *will* preclude a candidate, elector, or taxpayer from contesting the certification of election, or preclude Florida voters from participating fully in the federal electoral process. Bush App. at 37a. Both the virtually absolute duty to accept untimely returns and the "test" for rejecting such returns have

1. The court itself recognized that it was creating new law, *see* Bush App. at 36-37a. ("Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed *after the initial statutory date* are limited.") (emphasis added), and remedies, *see* Bush App. at 37-38a ("[W]e conclude that we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here."). The Attorney General has also recognized that the court created a new substantive right. A.G. Br. at 5 ("Technical statutory requirements must not be exalted over the substance of this right.").

no basis in the legislative enactments. They are new judicially created provisions.

There are several other changes in the law that are not in real dispute. *First*, no party disputes that the court below *applied* the law differently in this election than in elections past. *Second*, no party disputes that the seven-day deadline in sections 102.111 and 102.112 has been replaced with a 19-day deadline for the purposes of this Presidential election and an indefinite standard created for future elections. *Third*, no party disputes that the contest period is shorter and the protest period longer than they would have been but for the decision below. The point is not to question the court's prerogative to create new rights under state law; the issue is simply whether that decision changed the law.[2]

Certain respondents raise the puzzling argument that only legislatures can change the law, and judicial decisions construing statutes cannot.[3] *See, e.g.*, Gore Respondents Br. at 18; A.G. Br. at 10-11; Palm Beach Br. at 10-13. This Court, however, has recognized instances in which judicial construction has changed the law. For example, "[i]f judicial construction of

2. Moreover, the legislature vested the Secretary with the authority to maintain uniformity in the application, operation and interpretation of the election law and to issue legal opinions regarding that law. Fla. Stat. §§ 97.012(1), 106.23 (2000). In this case, the Secretary issued an opinion interpreting section 102.166(4) to mean that manual recounts for voter error were not authorized during the protest period. The court below created a new common law right to a manual recount in the protest period for almost any purpose. Though the Gore Respondents contend that the decision of the court below was "governed by state laws that long antedate this election," Gore Respondents Br. at 13, they do not, however, offer any legal support for that contention.

3. Additionally, the Attorney General argues that because the legislature was aware that courts interpret and expand the law when they passed the Election Code, the legislature has somehow consented to any possible modifications the courts may make to the statutes. A.G. Br. at 15-19. Such a delegation of power would violate separation of powers under any test.

a statute is unexpected and indefensible by reference to the law which had been expressed," it constitutes a change in the law. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). And, "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353-54. Specifically, in the context of election law, the United States Court of Appeals for the Eleventh Circuit recently recognized that a post-election judicial decision can constitute a change in the law. *Roe v. Alabama*, 43 F.3d 574 (CA11 1995) (holding that a post-election judicial decision affecting the requirements for filing absentee ballots constituted a change in the law).[4]

Finally, the contention that this case presents a matter of state law that should not be reviewed by this Court is incorrect and misconstrues the relief sought. Florida courts are, of course, free to create constitutional or common law rights. The question before this Court, however, is whether the law in Florida changed with respect to elections after November 7, not whether the change was correct or proper under state law. This Court does not have to express any opinion on the propriety of the common law and constitutional rights created below to answer this question.[5] Nor will this Court's decision affect the *prospective* application of those rights. The only issue is whether the newly-created state rights can be applied retroactively to this federal election. *Bouie*, 378 U.S. at 362 ("While such a construction is

4. The State of Alabama's Amici Brief discusses the history of this case, Ala. Br. at 4-10, 21-25, and provides poignant examples of how post-election changes in the law have serious and far-reaching ramifications, *id.* at 13-21.

5. Therefore, principles of federalism would not bar the relief sought in this case. Though this Court ordinarily does not review a state court's interpretation of a state statute, this Court and the lower federal courts certainly must review such matters to determine if they comply with federal law. *Cf. Carmell v. Texas*, 529 U.S. 513, n.31 (2000) ("Whether a state law is properly characterized as falling under the Ex Post Facto Clause, however, is a federal question we determine ourselves.").

of course valid for the future, it may not be applied retroactively, [any] more than a legislative enactment may be. . . .").

CONCLUSION

A reading of the decision below demonstrates that the Supreme Court of Florida changed the election law on November 21 in several important respects. If this Court finds that the Supreme Court of Florida's application of the new election law to this Presidential election violated federal law, the Court should modify the decision under review and order that no returns from manual recounts received after the November 14 certification should be permitted to be counted in the total of votes for Presidential Electors. Therefore, the totals certified on November 15 and the overseas ballots received by November 17 would constitute the complete certification for the Presidential Electors for the State of Florida.

Respectfully submitted,

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November 30, 2000
Supplemental brief by Al Gore

No. 00-836

IN THE

Supreme Court of the United States

George W. Bush,
Petitioner,
v.
Palm Beach County Canvassing Board, *et al*.,
Respondents.

On Writ of Certiorari
to the Supreme Court of Florida

SUPPLEMENTAL BRIEF OF RESPONDENTS AL GORE, JR., AND FLORIDA DEMOCRATIC PARTY

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November 30, 2000

I. PETITIONER'S DUE PROCESS CLAIM WAS NOT PROPERLY RAISED AND HAS NO MERIT.

Petitioner's opening brief contained no separate due process argument and mentioned the phrases "due process" and "fundamental fairness" only in passing, as part of a discussion of *Roe* v. *Alabama*, 43 F.3d 474 (CA 11 1995) (per curiam). See Pet.Br. 28. Accordingly, Respondents had no occasion to respond to any due process issue in their reply brief. However, Petitioner's reply brief now seeks to resurrect a due process claim. Pet. Reply Br.18-19. That attempt is improper, both because the claim was not raised adequately in the opening brief and because it seeks to smuggle in questions relating to the conduct of manual recounts on which this Court has denied certiorari. In any event the claim has no merit. The Florida Supreme Court's decision did not constitute a retroactive change in the law at all. Even if it had constituted such a change, it would not have deprived Petitioner of any protected liberty or property interest or worked any unfairness, for the reasons we have already stated in our opening brief, at pp. 44-49.

II. THE QUESTION WHETHER THE FLORIDA LEGISLATURE CAN AT THIS TIME APPOINT ITS OWN ELECTORS BY STATUTE IS NOT BEFORE THIS COURT FOR DECISION.

Petitioner's Reply Brief continues to press arguments that simply are not encompassed by the questions that this Court agreed to decide. Thus, Petitioner and his *amici* have continually raised the possibility that the Florida Legislature might convene to enact legislation intended to appoint Florida's electors if the State's courts fail conclusively to decide the disputes pending before them by December 12th. Pet. Reply Br. at 19-20. The validity of speculative

future conduct by the Florida Legislature is not before this Court. It is quite clear in particular that the question whether such state legislation in the wake of an election is authorized by 3 U.S.C. § 2 is not before this Court for decision. The questions presented by petitioners and the additional question suggested by this Court are directed entirely at the validity of the Florida Supreme Court's action as measured against 3 U.S.C. § 5 and Article II, § 1, cl. 2 of the United States Constitution. *Webster* v. *Doe*, 486 U.S. 592 (1988) (question not presented in petition for certiorari will not be considered); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-78 (1938).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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November 30, 2000
Florida. Supreme Court Ruling on Gore v. Palm Beach Butterfly Ballots

Supreme Court of Florida

Nos. SC00-2373 & SC00-2376

ANDRE FLADELL, et al.,
Appellants,

vs.

PALM BEACH COUNTY CANVASSING BOARD, etc., et al.,
Appellees.

JULIUS KATZ, et al.,
Appellants,

vs.

FLORIDA ELECTIONS CANVASSING COMMISSION, etc., et al.,
Appellees.

[December 1, 2000]

PER CURIAM.

We have for review a trial court order appealed to the Fourth District Court of Appeal, which certified the order to be of great public importance and to require immediate resolution by this Court. We have jurisdiction pursuant to article V,

section 3(b)(5) of the Florida Constitution.

The issue in this case concerns the legality of the form of the ballot used in Palm Beach County, Florida, in the November 7, 2000, general election for the President and Vice President of the United States. The remedy sought by the appellants[1] is a re-vote, a new election, or a statistical reallocation of the election totals in Palm Beach County.

In the trial court below, the appellants filed complaints containing several claims for declaratory, injunctive, and other relief. After holding a hearing, the trial court denied relief. The appellants appealed to the Fourth District Court of Appeal, which certified the trial court's order to this Court based on the Court's "pass-through" jurisdiction. In their briefs, the appellants have asked this Court to rule on the legality of the Palm Beach County ballot. They claim that the ballot is patently defective on its face in that the form and design of the ballot violated the statutory requirements of Florida election law. The appellants contend that the ballot was confusing and, as a result, they fear that they may have cast their vote for a candidate other than the one they intended.

The ballot form alleged to be patently defective was attached to the complaints as an exhibit. Exhibits attached to a pleading become a part of the

[1] The appellants in this case are electors from Palm Beach County.

pleading for all purposes. See Fla. R. Civ. P. 1.130(b). If an exhibit facially negates the cause of action asserted, the document attached as an exhibit controls and must be considered in determining a motion to dismiss. See Health Application Sys., Inc. v. Hartford Life & Accident Ins. Co., 381 So. 2d 294, 297 (Fla. 1st DCA 1980).

As a general rule, a court should not void an election for ballot form defects unless such defects cause the ballot to be in substantial noncompliance with the statutory election requirements. See Nelson v. Robinson, 301 So. 2d 508, 510 (Fla. 2d DCA 1974) (rejecting a post-election challenge based upon an alleged defect in the alignment of the candidates' names on the ballot). When considering a petition alleging a violation in the form of the ballot,[2] "a vital consideration guiding the courts in determining whether an election should be voided is the reluctance to reach a decision which would result in the disfranchisement of the voters. Indeed, as regards defects in ballots, the courts have generally declined to void an election unless such defects clearly operate to prevent that free, fair and open choice." Id. at 510.

In the present case, even accepting appellants' allegations, we conclude as a

[2] We note that in this case we consider and rule upon only the narrow issue regarding the form of the ballot in Palm Beach County.

matter of law that the Palm Beach County ballot does not constitute substantial noncompliance with the statutory requirements mandating the voiding of the election. This was the threshold issue in respect to whether the complaints stated a cause of action. Accordingly, we affirm the trial court's dismissal with prejudice of the complaints. Because the dismissal would be proper on that basis, we conclude that all other issues ruled upon by the trial court were not properly reached and, therefore, the court's rulings thereon are a nullity.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

NO MOTION FOR REHEARING WILL BE ALLOWED.

Two Cases Consolidated:

SC00-2373 (FLADELL)

Appeal of Judgment of Circuit Court, in and for Palm Beach County, Jorge Labarga, Judge, Case Nos. CL 00-10965 AB; CL 00-10970AB; CL 00-10988 AB; CL 00-10992 AB; CL 00-11000 AB - Certified by the District Court of Appeal, Fourth District, Case Nos. 4D00-4145; 4D00-4146; and 4D00-4153

Henry B. Handler, David K. Friedman, Donald Feldman and William J. Cornwell of Weiss & Handler, P.A., Boca Raton, Florida; Gary M. Farmer, Jr. of Gillespie, Goldman, Kronengold & Farmer, P.A., Fort Lauderdale, Florida; and David H. Krathen of the Law Offices of David Krathen, Fort Lauderdale, Florida,

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Deborah K. Kearney, General Counsel, and Kerey Carpenter, Assistant General Counsel, Tallahassee, Florida; Victoria L. Weber and Donna E. Blanton, Tallahassee, Florida, and David I. Spector, West Palm Beach, Florida, of Steel, Hector & Davis, LLP, on behalf of the Secretary of State Katherine Harris, Clay Roberts, Director of the Division of Elections, and the Elections Canvassing Commission; Barry Richard of Greenberg, Traurig, P.A., Tallahassee, Florida, on behalf of George W. Bush; and Leonard Berger, West Palm Beach, Florida; Bruce Rogow and Beverly A. Pohl, Fort Lauderdale, Florida; and Robert M. Montgomery, Jr., West Palm Beach, Florida, on behalf of Palm Beach County Canvassing Board, and Theresa Lepore, Supervisor of Elections,

Appellees

Case No. SC00-2376 (KATZ)

Appeal of Judgment of Circuit Court, in and for Palm Beach County, Jorge Labarga, Judge, Case No. CL 00-11302 AB - Certified by the District Court of Appeal, Fourth District, Case No. 4D00-4187

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Appellees

December 1, 2000
Transcript of Oral Arguments Before United States Supreme Court

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - x

GEORGE W. BUSH, :

Petitioner, :

v. : No. 00-836

PALM BEACH COUNTY :

CANVASSING BOARD, :

Respondent. :

- - - - - - - - - - - - - - - - - - x

Washington, D.C.

Friday, December 1, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of the Petitioner.

JOSEPH P. KLOCK, JR., ESQ., Miami, Florida; on behalf of Respondents Katherine Harris, et al., in support of Petitioner.

PAUL F. HANCOCK, ESQ., Tallahassee, Florida; on behalf of Respondent Robert A. Butterworth.

LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on behalf of Respondents Al Gore, Jr. and Florida Democratic Party.

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P R O C E E D I N G S

[10:00 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument this morning in number 00-836, George W. Bush vs. The Palm Beach County Canvassing Board. Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF PETITIONER

MR. OLSON: And may it please the Court: Two weeks after the November 7 presidential election, the Florida Supreme Court overturned and materially rewrote portions of the carefully formulated set of laws enacted by Florida's legislature to govern the conduct of that election and the determination of controversies with respect to who prevailed on November 7th. These laws have been formulated by the Florida legislature pursuant to an express delegation of authority, to wit, by the United States Constitution. The election code that the Florida legislature developed conformed to Title 3, Section 5 of the United States Code. That provision invites states to devise rules in advance of an election, to govern the counting of votes and the settling of election controversy.

QUESTION: Well, Mr. Olson, isn't Section 5 sort of a safe harbor provision for states, and do you think that it gives some independent right of a candidate to

overturn a Florida decision based on that section?

MR. OLSON: We do, Justice O'Connor. It is a safe harbor, but it's more than that. And Section 5 of Title 3 needs to be construed in connection with the history that brought it forth --

QUESTION: Yes. But I would have thought it was a section designed in the case of, some election contest ends up before the Congress, a factor that the Congress can look at in resolving such a dispute. I just don't quite understand how it would be independently enforceable.

MR. OLSON: That's why I've mentioned the context in which that section was adopted. In light of the extreme controversy that was faced by this country as a result of the 1876 election, and as this Court knows, that election was very close and led to controversy, contest, discord, Congress was very much concerned about the possibility of that happening again, and one of the reasons --

QUESTION: Yeah, but what they did was, and it's typical of grant-in-aid programs, they said if you run a clean shop down there, we'll give you a bonus, and if you don't, well, you take your chances with everybody else.

MR. OLSON: Justice Kennedy, I submit that it is much like a compact that Congress is offering in the form

of Section 5, yes. If you do these things, certain things will happen. But among these things, what Congress wanted to accomplish with Section 5 was not only to provide the benefit to the states, but to provide the benefit to the United States of the states accepting that implicit proposal.

QUESTION: But what is there in the opinion of the Supreme Court of Florida that indicates that it relied on this Federal statute in the reasoning for its decision and in its judgment?

MR. OLSON: Well, I think the fact is that it did not. What it did was it disregarded the compact. When the state adopted a code of ethics, or a code of election procedures to govern the election and the determination of disputes pursuant to the election, it brought itself into that safe harbor and guaranteed to the voters and the candidates in that state that the controversy and turmoil that infected this country after the 1876 --

QUESTION: Well, we are looking for a Federal issue, and I thought that you might have argued that the Secretary of State was instructed by the Supreme Court not to jeopardize the state's chances and then cited 3 U.S.C. Sections 1 through 10. And so if the, if the state supreme court relied on a Federal issue or a Federal

background principle and got it wrong, then you can be here.

MR. OLSON: Well, I certainly agree that it mentioned those provisions. I'm simply saying that it blew past the important provisions of Section 5 and the benefits that Section 5 gives to the states to the voters in that state and to the people running for office in that state. That is to say that if the rules are complied with, if disputes are resolved according to the rules that are set forth, then not only will the electors chosen by the voters in that state be given conclusive effect at the time they are counted by Congress but we will not have the controversy, dispute and chaos that's been taking place in Florida.

QUESTION: Mr. Olson, suppose a less, a less controversial Federal benefit scheme, let's say the scheme that says states can get highway funds if, if they hold their highway speeds to a certain level, all right? And suppose you have a state supreme court that in your view unreasonably interprets a state statute as not holding highway speed to the level required in order to get the benefit of that safe harbor. Would you think that that raises a Federal question and that you could appeal the state court decision here because it deprived the state of the benefit of the highway funds?

MR. OLSON: No, I don't think so.

QUESTION: Why is this any different?

MR. OLSON: This is a great deal different because this is -- first of all, Article II of the Constitution which vests authority to establish the rules exclusively in the legislatures of the state, tie in with Section 5. Secondly, as this Court has stated --

QUESTION: Well, let's just talk about Section 5. I mean, the constitutional question's another one. Why is Section 5 in that regard any different from the highway funding?

MR. OLSON: I think it -- I think it can't be divorced from Article II of the Constitution because it's a part of a plan for the vesting in the legislatures of a state, and Section 5 implements Article II in the sense that it provides a benefit not just to the state but to the voters.

QUESTION: But just talk about the statutory issue. I assume that if we worked long enough with Justice Scalia's hypothetical, we could find a case where a court adjudicated with reference to the Federal principle and got the Federal principle wrong. Did -- Indiana vs. Brand and that kind of thing. Did that happen here?

MR. OLSON: Well, I think that the state did not

pay, the state supreme court did not pay much attention to the Federal statute. It was obviously aware of it. It did get the Federal principle --

QUESTION: Well, then there is no Federal constitutional issue here.

MR. OLSON: Well, there is a Federal--

QUESTION: Pardon me, statutory issue.

MR. OLSON: Well, we believe that there is, Justice Kennedy, because although the state recognized it, it blew right past it. The state legislature adopted the code that the Section 5 of Article 3 of Title 3 invited it to do. The state supreme court, which had no right under the Constitution, but I can't divorce the constitutional provision from Section 5, then overturned the plan that the state enacted through its legislature to make sure that what happened down in Florida was not going to happen. And so what the state supreme court did, knowing full well that these provisions existed, overturned the carefully enacted plan by Florida.

QUESTION: Mr. Olson, do you think that Congress when it passed 3 U.S. Code, intended that there would be any judicial involvement? I mean, it seems to me it can just as easily be read as a direction to Congress, saying what we are going to do when these electoral votes are presented to us for counting.

MR. OLSON: I think that it was intend -- directed to Congress, but it seems to me that in the context in which it was adopted and the promise that it afforded, that the conclusive effect would be given to the state selection of electors, that is a somewhat empty remedy and it doesn't accomplish Congress' objectives if it cannot be enforced when an agency of the state government steps in as the Florida Supreme Court did here and overturn the plan by which the Florida legislature carefully set forth a program so that disputes could be resolved, and we wouldn't have the controversy, conflict and chaos that we submit exists today in Florida.

QUESTION: Mr. Olson, your -- your submission is based on the premise that the Florida court overturned something that the statute did not. Is it not arguable, at least, that all they did was fill gaps that had not been addressed before?

MR. OLSON: Justice Stevens, I don't think that in this case that's even remotely arguable. What the state supreme court did is take a set of timetables, a set of provisions that --

QUESTION: Yes. And the first one was the mandatory -- is it your view still that the shall date controls in all respects?

MR. OLSON: No. Not necessarily. But the 102

-- there is the two provisions, Section 102.111 and 102.112. 111 contains the shall date, 102 contains the may date.

QUESTION: Correct.

MR. OLSON: Both of those statutes, both of those provisions say that the returns must be, or shall be filed by a certain deadline. The shall and the may provisions simply relate to the possible remedy. We submit that under either interpretation the Secretary of State of Florida either must or shall ignore those returns, or may set those aside in her discretion.

QUESTION: Does that mean if there were an act of God that prevented the returns from being filed that she would have discretion either to accept or reject the returns?

MR. OLSON: Yes, I believe --

QUESTION: She would have the discretion?

MR. OLSON: Yes.

QUESTION: Would she be compelled in that event to accept the returns?

MR. OLSON: I don't think so. She took the position --

QUESTION: She has the total discretion either to accept or reject?

MR. OLSON: That's --

QUESTION: Is there any circumstance in which she would be compelled to accept a late return?

MR. OLSON: I don't know of any. I haven't thought of any, Justice Stevens.

QUESTION: Well, you are arguing in effect that it's a mandatory deadline. I wonder if you really mean it's mandatory.

MR. OLSON: Well, the problem is that it's -- what we are saying is that either it's mandatory, in which case she could not accept them.

QUESTION: But you don't know whether it's mandatory or not?

MR. OLSON: Well, the Florida Supreme Court and what the circuit court did in that case, it said that it wasn't -- and we'll accept this for purposes of this argument that it wasn't --

QUESTION: Yes, but one of the things that's of interest to me is the extent to which you say there was a change in the law. It seems to me that in order to answer that question you have to know what your view of the law was before this all happened.

MR. OLSON: I think that we can answer that this way, is that whether it was shall ignore or may ignore. It was not must accept.

QUESTION: Under any circumstance it was not

must?

MR. OLSON: No, under no circumstances was it must accept. Now --

QUESTION: Even in an act of God or fraud?

MR. OLSON: I don't believe so, Justice Stevens.

QUESTION: Okay.

QUESTION: Mr. --

QUESTION: Isn't the law in Florida like as in most states, and in the Federal government, that when an official has discretion, may accept or may not accept, that has to be exercised within the limits of reason?

MR. OLSON: Yes.

QUESTION: Well, then, isn't it possible that when the court says she must accept under certain circumstances, what they mean is outside those circumstances, given the circumstances here it would be unreasonable to refuse?

MR. OLSON: Well, what the court did was so constrain those circumstances, virtually to make them nonexistent.

QUESTION: All right. So then what you're arguing about is a determination by the state court of Florida as to what the circumstances are under state law where the action of a state official would or would not be reasonable.

MR. OLSON: I think that -- yes, but I think that it has to be looked at in the context in which that was done when the state supreme court so constrained and says in its opinion shall accept these late returns until 5 p.m. on November 26th, and in the context there was no discretion left for the Secretary of State at all.

QUESTION: Mr. Olson, may I ask you, because you've been skipping over what I thought was a key piece of the Florida legislation. The Florida Supreme Court said, there's the deadline, and that conflicts with another provision of this law, the provision that says there shall be under certain circumstances recounts, and then there's a rather detailed description of the process that's necessary, the time line for when you can ask the recount is on the 6th day.

MR. OLSON: Up to.

QUESTION: Yeah, up to. And it would be impossible in a populous county to in one day do what the statute instructs must be done when there's a recount. The Florida Supreme Court said, it's right in its opinion, there's two conflicts, and the first one they mention straight out on page 21A of your appendix, is that there has to be a reconciliation between this, yes, there can be recounts and, yes, there's a deadline. So they are trying to reconcile two provisions.

MR. OLSON: The first part of the recount provision to which you're referring, Justice Ginsburg, says may conduct a recount. Under certain circumstances after the sampling part of that process is taken, if it's taken in the county canvassing board's discretion, then under certain circumstances it's supposed to go forward with a more fulsome process, but the legislature being fully aware of the recount provisions and the importance of -- this ties in with the protest period for the election, which overlaps the recount provisions, and the contest provision for the election, and the fact that all of this has to be done in the context of a presidential election.

Under any other kind of election, these things wouldn't be nearly as important, but we have very important timetables, and as this Court has said a presidential election is so important to the rest of the nation, and there is such high Federal interest in accomplishing these things in the right way, what the Florida legislature did is balance the protest period, the recount period with the contest period, and state that there shall be certain deadlines before which certain things need to be done and after which, so what those two statutes say is that there may be a recount, but that there shall be compliance with the time deadline. It also

says that --

QUESTION: But that's something that one can certainly argue. My problem is, one could also argue what the Florida Supreme Court said, and I do not know of any case where we have impugned a state supreme court the way you are doing in this case. I mean, in case after case we have said we owe the highest respect to what the state says, state supreme court says, is the state's law.

MR. OLSON: This is a very unusual situation, Justice Ginsburg, because it is in the context of a presidential election, and it is in the context of Federal rights. This Court has, in the areas in which we've described in our brief, undertaken to review the meaning and the effect that the state supreme court or state court decision under certain circumstances. We submit this is one. What the Florida Supreme --

QUESTION: But I said, and even in the very cases that you cite, because I checked them, that we owe the highest respect to the state court when it says what the state law is.

MR. OLSON: Yes, but then the Court has also said, then we go on to see the extent to which what the state court did, as we cited in the Lindsey case, for example, in the ex post facto context, we go on to see what the import of that is in connection with the Federal

right. I would emphasize that what the Florida Supreme Court did is basically essentially say, we're rewriting the statute, we're changing it.

QUESTION: Does the Secretary have any flexibility to accommodate the statute to the exigencies was presidential election? The Secretary of State.

MR. OLSON: The Secretary of State did. It doesn't -- she doesn't much anymore because what has happened -- and I would like to finish that one point, that the Florida Supreme Court said we are not going to be bound by technical statutory requirements or what the supreme court called hyper-technical statutory requirements. Instead, we are going to resort to the will of the people, the will of the electorate, the will of the voters, so to speak, and we are going to -- because we can't rewrite the statute, but we are going to partially rewrite the statute, we are going to resort to our equitable powers. So what -- and among the things that the court did, and there are a range of them, as I have indicated, they took away the discretion of the Secretary and instructed her to accept these manual recount returns.

QUESTION: Mr. Olson, on the equitable powers, they were doing that in setting a new deadline, and I don't think you would argue the case would have been more acceptable if there had been no deadline?

MR. OLSON: No, it wouldn't have been, but --

QUESTION: And on the fight between may and shall, they relied on four traditional canons of statutory construction and not equity at all.

MR. OLSON: They recited four canons of statutory construction, Justice Stevens, but when they said they use those construction -- canons of statutory construction to say that the words may and shall mean shall not, that is not a reasonable exercise of statutory construction. I think what the -- it's relatively obvious that what the supreme court did is exactly what Article -- Section 5 of Article III intends not to happen. Change the rules.

QUESTION: I don't read their opinion that way, Mr. Olson. It seems to me that the portion of their opinion dealing with statutory construction ends with a conclusion that the Secretary has discretion. The portion of the opinion employing the canons of construction does not place any limits upon the Secretary's discretion.

MR. OLSON: Well, yes, I agree with that up to a point, but then it says that she must accept these returns that are after the deadline.

QUESTION: That was not on the basis of any canons of statutory construction. That was on the basis of the state's constitution.

MR. OLSON: That's right, but -- so there was both going on, and what the court was bound and determined to do was to get to a consequence that the court determined was consistent with the will of the people, irrespective of what the statute --

QUESTION: Mr. Olson, would you agree that when we read a state court decision, we should read it in the light most favorable to the integrity of the state supreme court, that if there are two possible readings, one that would impute to that court injudicial behavior, lack of integrity, indeed dishonesty, and the other one that would read the opinion to say we think this court is attempting to construe the state law -- it may have been wrong, we might have interpreted it differently, but we are not the arbiters, they are.

MR. OLSON: I would like to answer that in two ways. In the first place, I don't mean to suggest, and I hope my words didn't, that there was a lack of integrity or any dishonesty by the Florida Supreme Court. What we're saying, that it was acting far outside the scope of its authority in connection with an exercise of power that is vested by the Constitution of the United States --

QUESTION: But if it tells us -- if it tells us, we see these two provisions in conflict, they need to be reconciled.

MR. OLSON: But -- under almost any other circumstances, yes, Justice Ginsburg, but in this context, in this context, we are talking about a Federal right, a Federal constitutional right, and the rights of individual citizens under the Constitution and so therefore, this Court has a grave responsibility to look --

QUESTION: Mr. Olson, I'd like to get focused a little more on this same area. If it were purely a matter of state law, I suppose we normally would leave it alone where the state supreme court found it, and so you probably have to persuade us there is some issue of Federal law here. Otherwise, why are we acting?

MR. OLSON: Yes.

QUESTION: And are you relying in that regard on Title 2? I mean, would you like to -- Article II? Would you like to characterize the Federal issue that you think governs this?

MR. OLSON: Well, we are very definitely relying on Article II of the Constitution. The framers of the Constitution debated long and hard. It was one of the longest debates that took place during the formation of the Constitution. Where should this power be lodged, in the Federal legislature, in the state legislature, at the ballot booth or what. The one thing that was discussed and rejected by virtually everyone is that the power to

select the manner in which electors would be appointed would be in the state judiciary, and we quote -- in the state judiciary. That was rejected.

The notion that it would be vested in the state judiciary was something that was rejected, and what the framers decided to do is to vest it in the state legislature and vested that authority under Article II, not just in the state, but the legislature.

QUESTION: And the state legislature could vest it in the judiciary if it wanted, as I read the McPherson case, and here they have done something less. The state judiciary said, we are going to invoke the ordinary election procedures, which you know, warts and all, it involves some interpretation by the courts and contest proceedings, et cetera.

MR. OLSON: Well, it is -- yes, it said that, Justice Kennedy. But what it did was supplant a set of rules elect -- enacted before the election to govern the election, for a set of rules made up after the election.

QUESTION: All right. Mr. Olson, let's assume that it did that, for the sake of argument. I want to go back to the issue that the Chief Justice raised a little while ago, and I'd like you to comment on this line of reasoning. You've got Section 5. Congress in the statute seems to have gone to great lengths to provide what to do

in the situation that you are describing, accepting your view of the case.

Section 5, it says if you do certain things within certain times, the conclusion that you draw is going to be conclusive upon the Congress. In Section 15, it sets out in fact an elaborate set of contingencies about what the Congress is supposed to do and can do if there is a dispute as to whether a given set of procedures in the state have conformed to Section 5. Section 15 refers to regularity. It refers to legality and illegality. It looks to me as though at least at this stage of the proceedings, Congress has said if there is a question about whether this if-then provision in Section 5, construing Article II, has been satisfied, then this is the decisional tree for the Congress to follow in deciding what to do about it and in resolving challenges.

It looks to me as though at this stage of the game, the statute has committed the determination of the issues that you raise and the consequences to follow from them to the Congress. Why should the Court, why should the Federal judiciary be interfering in what seems to be a very carefully thought out scheme for determining what happens if you are right?

MR. OLSON: Because I submit that that writes Section 5 essentially out of existence if an agency of

state government, if a state legislature --

QUESTION: No. It doesn't write it out of existence. It provides in Section 15 what happens if the state agency does what you say it did.

MR. OLSON: If the state agency, if the state legislature empowered by Article II of the Constitution, does what it is invited to do by Section 5, and then another agency of state government, in this case the state supreme court, comes along and upsets that scheme, yes, you have ultimate resort to the resolution of the dispute under Sections 15 of Title 3, but that's precisely --

QUESTION: Well, you say you have ultimate resort. But that begs the question, that seems to be precisely the resort that Congress has provided.

MR. OLSON: Well, I'm not making myself clear, I think, is that the importance of Section 5 was to invite the state to do things that would avoid the chaos and the conflict and the controversy and the unsettled situation that this country faced in 1876, and --

QUESTION: Mr. Olson, did Section 15 exist when McPherson was decided?

MR. OLSON: I don't know, Justice Scalia. I don't know the answer to that, when it was adopted. I can't recall whether it was a part of the 1887 electoral count statute or not. I can probably answer that in

regard --

QUESTION: That would make a difference, wouldn't it?

MR. OLSON: Well, it seems to me it wouldn't make a difference, because of this. It might -- yes, it certainly might make a difference one way, but it still wouldn't make a difference because our concept here, and I think it's quite a rational and actually the only explanation for how you can put these provisions together, Article II and Section 5, and Congress' desire to avoid the very controversy, chaos, conflict, which even --

QUESTION: Well, but Section 15 assumes that there is controversy and chaos.

MR. OLSON: Yes.

QUESTION: Section 15 isn't providing for challenges except in situations perhaps exactly like this one.

MR. OLSON: But that's what the country -- what essentially Section 15, although it modifies it and structures it somewhat, it was still a situation that Congress was facing in 1876 when it was dealing with the Hayes-Tilden election.

QUESTION: Right.

MR. OLSON: And by the time it got there, there were dueling slates of electors that were buying -- there

were exchanges and a lot of things that everyone felt was very destructive to the country.

QUESTION: But Congress had to face the constitutional fact that under Article II, it could not, or its understanding was certainly, that it could not mandate certain state procedures. Article II did say the legislature shall decide what they are.

MR. OLSON: Correct.

QUESTION: So the most that Congress could do in providing for a more orderly resolution of what happened in Hayes-Tilden was to do what it did in Section 5, and that is to say if you do certain things, you can depend upon the results, recognizing that the state might not do those things. And it then provided, or at least at the present time it is provided in Article, in Section 15, that if you don't do those things, there is a sequence of issues that can be raised to be decided by the Congress.

If Congress wanted this Court to get into the issue at this stage, it seems passing strange to me that despite all the elaborateness of Section 15 there wouldn't have been some mention of Federal litigation proceeding in the Section 15 proceeding.

MR. OLSON: I think that's a very important point, and let me make it: That Congress did say if you do these things, certain consequences will flow from it.

Florida did these things, and we submit that there is, that the courts are here to protect the benefit of the bargain that Florida made when it responded to that invitation, because --

QUESTION: We have to separate your statutory argument from your Constitutional argument. To the extent that you are relying just on the Constitution, do you think that Congress could by Section 15 exclude the courts from adjudicating the constitutionality of what the state has done?

MR. OLSON: No, I don't think so.

QUESTION: But it certainly could express its preference for a scheme whereby the initial litigation, if you will, at this level, would take place in the Congress. To acknowledge that is not to say that the issue is justiciable or that this Court has somehow been necessarily excluded from the process for all time. It is simply to say that the first line of litigation at the Federal level seems under the statute to be Congress, and not the Court.

QUESTION: Isn't that a fair reading of 15?

MR. OLSON: That's not a fair reading of Section 5, and let me answer this question, and I would like with the Court's permission to reserve the time --

QUESTION: Well, I don't think Section 5 goes to

the issue. The question is whether it's a fair reading of Section 15.

MR. OLSON: I don't think that they can be read in isolation. I think that Section 5 was designed to avoid the problem created by the controversy and the having to resolve this in Congress, which is exactly what did happen in 1876, and was a very unsatisfactory situation.

QUESTION: And in 1876, Congress did not have --

QUESTION: 1877.

QUESTION: -- the rules with --

QUESTION: 1877.

QUESTION: Congress did not have the rules with respect to conclusiveness that it now has under Section 5.

MR. OLSON: That's right. And it put those rules with respect to conclusiveness into Section 5. The Florida legislature bought into that scheme and now the Florida Supreme Court, which doesn't have any Constitutional authority pursuant to Section 2 to do so, upset that scheme, deprived Florida of the benefit of doing exactly what Congress wanted to have happen under Section 5. I would, with the Court's permission, reserve the balance of my time.

QUESTION: Very well, Mr. Olson. Mr. Klock, we'll hear from you.

ORAL ARGUMENT OF JOSEPH P. KLOCK, JR.

ON BEHALF OF THE RESPONDENTS KATHERINE HARRIS, ET AL., IN SUPPORT OF PETITIONER

MR. KLOCK: Mr. Chief Justice, and may it please the Court:

Our argument is simply addressed to issues having to do with Florida law, and the point being raised by the Secretary is this, that the law in the state of Florida on November 7 was changed by the Supreme Court of Florida's decision on November 21. The Secretary is not contesting the right of the Florida Supreme Court to change the law of Florida, is simply pointing, she is simply pointing out, that the law did change.

QUESTION: Does the Secretary maintain that in some instances she has a discretion that a court does not or can a court do whatever she might do, under Florida law?

MR. KLOCK: Under Florida law, she has certain discretion that I think a court probably does not have in the protest period, Justice Kennedy, and that would be that she had the discretion to decide whether or not returns could be permitted after that seventh day, and indeed that's based on two things that we have in the record. One is an opinion that was issued by the Division of Elections that talks about the circumstances in which

the Secretary would exercise discretion, and the second is the letter that the Secretary sent to the three or four canvassing boards that requested an extension of time after the 14th deadline had passed.

She sent the letter out, she said, please indicate to me whether or not you intend to file returns after the deadline, and if you do what the reasons are.

She collected a set of criteria, she applied the criteria, and then sent a letter back, and what she did, Justice Kennedy, in the case of the Division's letter, the opinion which, of course, is binding under Florida law on elections officials who receive them, she -- the Division head said that there were certain circumstances such as acts of God, hurricanes, and that kind of thing where the discretion would be exercised. When she came up with her additional reasons for considering whether or not she would exercise her discretion, she indicated a number of them which are also contained within the record. It's at the Joint Appendix at 21, she indicated where there was a result of voter fraud with a substantial --

QUESTION: She said she would exercise her discretion. Did she say she would have to exercise her discretion in those conditions?

MR. KLOCK: I think she would have to exercise her discretion.

QUESTION: The court did compel her to?

MR. KLOCK: Yes, sir.

QUESTION: Do you think that was clear before the opinion of the supreme court in this case?

MR. KLOCK: Yes, sir.

QUESTION: Let me just ask one general question for your comment on whether it's a change in the law. To what extent, in your view, was the -- did the Supreme Court of Florida consider itself bound by either prior precedent or the constitution of the state which preexisted?

MR. KLOCK: In terms of handing down its decision?

QUESTION: In terms of the particular result it reached in this case.

MR. KLOCK: I believe the Supreme Court of Florida was looking at its law in terms of articulating the law that it wanted to have then and on a going-forward basis. What it did -- and obviously since it's the chief court of the state, it has the right to do whatever it wishes to do with respect to Florida law only bound by whatever separation of powers --

QUESTION: Do you think they thought their decision was dictated either by prior precedent or by the constitution of the state?

MR. KLOCK: Your Honor, I don't know whether they thought that or not, but that's not what the opinion says. As a matter of fact, the opinion is pretty clear, they start out by talking about statutory construction, and they hinge everything on the use of the word interpret, and then they sort of turn the word interpret to a use that it's not intended to be, but then when they get to the point of designing the rule of law they're going to go forward on, they don't talk about interpreting the statute. They then go and base it on principles of equity in the Florida Constitution, and indeed what they end up with, Your Honor, is this statement with respect to the discretion that the Secretary is left with, and that is this -- and it's on 35 of the Joint Appendix. "We conclude that consistent with Florida's election scheme, the Secretary may reject a Board's," that's the canvassing board's, "amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting certification or preclude Florida voters from participating fully in the Federal electoral process."

Now, Your Honor, there's --

QUESTION: I understand your position is that was entirely new?

MR. KLOCK: Yes, sir.

QUESTION: I'm just wondering, therefore your submission is that it was not dictated by the constitution or by prior precedent?

MR. KLOCK: No, Your Honor.

QUESTION: I thought you said a moment ago that the court, the Florida court did rely on the Florida Constitution. There's a section of their opinion that's devoted to that.

MR. KLOCK: Your Honor, in devising the remedy, they refer to the Florida Constitution, but the issue that we're here on, as I understand it, sir, is whether or not the law changed. There's no question that they have a right to do what they did. The only --

QUESTION: I think perhaps another statement of the issue is to what extent did the Florida Supreme Court, in construing this statute, rely on more general provisions of the Florida Constitution which they cited in their opinion?

MR. KLOCK: I think they did rely, in creating the remedy on the Florida Constitution, I believe they created a right that had not previously been seen there, which they have a right to do, but, Mr. Chief Justice, the issue again is whether or not the law that they articulated on November 21 is different than the law that existed on November 7, and how the Secretary of State, in

exercising her discretion, was to divine the standard that would be established on November 21.

QUESTION: Your position is so long as it's different, it violates Section 5 and therefore we have a right to step in?

MR. KLOCK: Well, Justice Scalia, we have not addressed the Federal issues because, I mean, we're in a situation where you have --

QUESTION: Well, this is a Federal court what are you here for, if you're not addressing --

MR. KLOCK: I understand that, sir. I apologize. But we have the Secretary of State here, we have the Attorney General here, and the legislature has filed by amicus, and of course the state has not appeared, so it's a little unusual. We haven't addressed those issues, but to answer your question, yes, sir.

QUESTION: Can you tell me when this petition was filed here, the Secretary had not certified anybody the winner, and now the Secretary has certified a winner, and therefore, I guess, whether we win, whether your side, the side you're supporting wins or loses, it doesn't change that, and I guess that's moot, but my question is, is there any respect in which this really makes a difference, this case? How? I'm thinking, if it does make a difference, numbers of vote, is that kind of thing

right for us to decide now? How could it make a difference? What's the consequence of our going one way or the other now in this case?

MR. KLOCK: Your Honor, it makes an enormous difference because the relief that has been requested would be for the Court to determine that the law in effect at the time of the election was that manual recounting of ballots would not be permitted to address voter error, which I think has been extensively --

QUESTION: We don't have -- all -- suppose they won and the relief was, suppose your side won, and the relief was, fine, it should have been certified on November 14th or 18th instead of November 26th. Now, what's the consequence of that? Just that? Forgetting what the reasoning is. Is there a consequence that flows from that, that is real, adverse, you know, significant, concrete that we can predict now as opposed to speculate?

MR. KLOCK: The only immediate result would be that you would have a margin that instead of being 536 votes would be 900-some-odd votes, and it would only be added to as a result of whatever was added by the overseas ballots.

QUESTION: Fine. Then this case has said, we've said a claim is not ripe if it rests upon contingent future events that may not occur as anticipated or indeed

may not occur at all. And so what I wonder, is this in this realm of speculation as to whether or not it will or will not make a difference, a difference to the outcome of the election.

MR. KLOCK: It will make a difference to the outcome of the election because there is an ongoing contest which is interrelated and is involved with the Supreme Court's opinion, and of course because the Supreme Court of Florida, in coming up with the remedy that they came up with, completely changed the period of time from a relatively short period of time, seven days for a protest and much longer period for a contest, we now have a situation where there is 19 days for the protest and 16 days for a contest.

QUESTION: Well, it's too late -- it's too late to lengthen the time for the contest. I mean, to the extent that they have shortened the contest time, you know, that's water over the dam right now, isn't it?

MR. KLOCK: Yes, Justice Scalia, but the issue here -- I'm sorry.

QUESTION: Is it not the case that if the votes are, are as, as they have been shown to be under the Florida Supreme Court's opinion, the race is much closer, and therefore some counties under Florida law would conduct recounts that otherwise would not conduct

recounts. Doesn't whether a recount is conducted depend upon how likely it is that the recount is going to change the outcome?

MR. KLOCK: Your Honor, if the law is returned to the point it was on November 7, there is no right to a manual recount to correct voter error, and that will end the litigation that currently exists in the State of Florida, which were the opinions of the Secretary of State's Division of Elections that were issued and also the state of the law as it existed at that point in time. The record shows very clearly that there was no dispute that there were any problems with voting machines or any other tabulation problems with voting machines. It was simply when they went through the process of what is, Justice Ginsburg, a discretionary right to a manual recount, not a mandatory one, when they went into that and did the test, each of those canvassing boards did not find any problem with a mechanical problem. It was simply a problem in terms of voter error.

QUESTION: The secretary took the -- never mind. Thank you.

QUESTION: Thank you, Mr. Klock. Mr. Hancock, we'll hear from you.

ORAL ARGUMENT OF PAUL F. HANCOCK

ON BEHALF OF RESPONDENT ROBERT A. BUTTERWORTH

MR. HANCOCK: Mr. Chief Justice, and may it please the Court: In accordance with Article II of the United States Constitution, the Florida legislature has directed the manner of selecting presidential electors in Florida. That manner is pursuant to a popular vote that's implemented pursuant to the general election laws of the State of Florida.

QUESTION: I guess Article II permits the legislature in general to make a choice that it could itself select the electors?

MR. HANCOCK: Yes, Justice O'Connor. We agree with that. In implementing the election law, each branch of the Florida government plays a role. For example, the judiciary, or the executive branch of our government has not found itself bound by the technical, hypertechnical requirements of the election law. An example of that is that the, the executive branch has implemented a rule, not a law, but a rule that allows absentee ballots from overseas military voters to be received after the 10 days after the close of the polls. Under the law of the State of Florida, all absentee ballots have to be received by the time the polls close on election day.

QUESTION: In your brief you say, you conclude that the Florida Supreme Court like, I think it's page 12, like any state court, exercised its inherent equitable

powers to remedy a threat to fundamental constitutional rights, and it rewrote the certification deadlines according to that power, did it not?

MR. HANCOCK: The only -- yes, Justice Kennedy. The only equitable power exercised by the court was setting the deadline.

QUESTION: Isn't that such an amorphous general abstract standing that it can't possibly be said to be a law that was enacted and in place at the time of the election?

MR. HANCOCK: No. The laws were enacted well before the election. What happened was that in the court --

QUESTION: Of course, the Constitution was there before the election, the Due Process Clause is before the election, but what we are talking about is having laws of sufficient specificity and stability that people can rely on them in advance and not have them changed after the fact. And your brief makes it very clear that they exercised their inequitable powers to remedy a threat to fundamental constitutional rights and changed the deadline accordingly. It seems to me that's no standard -- it's an enviable standard, something we might all agree with in the end, but as far as the requisite specificity to satisfy 3 U.S.C. Section 5, I just don't see it as there.

MR. HANCOCK: The court had to do something, Justice Kennedy. It was faced with conflicts in Florida law. They had conflicting opinions from the Florida Attorney General as to the meaning of the law and the Secretary of State as to the meaning of the law. As a result of --

QUESTION: Maybe it had to do something, but did it comply with 3 U.S.C. Section 5?

MR. HANCOCK: I submit, Justice Kennedy, that 3 U.S.C. Section 5 doesn't require the state to do anything, it merely says --

QUESTION: But did it comply with that part of 3 U.S.C. Section 5 that requires that laws be enacted and in place prior to the election in order to get the safe harbor?

MR. HANCOCK: Yes, it did. The laws were in place before the election. And those laws granted to the judiciary --

QUESTION: Well, but certainly the date changed. That is a dramatic change. The date for certification, right?

MR. HANCOCK: Yes.

QUESTION: And it was done by the court.

MR. HANCOCK: Yes, it was done pursuant --

QUESTION: And the legislature had very clearly

said, you know, seven days after, that's the date, and it just does look like a very dramatic change made by the Florida court, and I'm wondering if that is consistent in fact with the notion, expressed at least in Section 5, so that the result would be if it did go to Congress, it would be a change.

MR. HANCOCK: The -- I agree that the date was implemented pursuant to the court's equitable powers. Other than that, it was a routine exercise in statutory construction. The court was faced with a situation first of all where because of conflicting advice the counties had started and then stopped conducting manual recounts because of advice from the secretary of the state which the supreme court ultimately concluded to be erroneous.

QUESTION: Yes. And that advice was -- and this was really the beginning of all of the problem, her advice was that the provision providing for recounts, manual recounts, not requiring them but giving them as one of the options, only came into play when there was some defect in the, in the machinery, and it was not available for voter error, that is for voters who didn't punch the cards the way they were supposed to. And the attorney, your office came out with the opposite conclusion.

The secretary's brief contends that that had always been the rule in Florida. Is that the case? Do

you know of any other elections in Florida in which recounts were conducted, manual recounts, because of an allegation that some voters did not punch the cards the way they should have through their fault? No problem with the machinery -- it's working fine. You know, there were what, pregnant chads, hanging chads, so forth?

MR. HANCOCK: No, Justice --

QUESTION: Did that ever happen --

MR. HANCOCK: No, I'm not aware of it ever happening before. But, I can say that the Supreme Court of Florida for 100 years has put a duty on election officials to discern the intent of the voter, and while the secretary of the state refers to it as voter error, when the ballot is punched, that's, under the laws of the State of Florida as interpreted by the supreme court, that voter has cast the ballot, even if the chad did not --

QUESTION: Is it your position that any interpretation the Supreme Court of Florida makes to implement the will of the people is never a new law?

MR. HANCOCK: The supreme -- yes. I can't say ever, but I'd say that on the case before the court, all that was before the court was ordinary statutory construction, which must be, the result of it whether this Court would agree with it or disagree with it, must be respected by this Court. That's the very foundation of

federalism.

QUESTION: Mr. Hancock, are you relying on the Florida Supreme Court statement at least twice in its opinion -- now I looked at the page to which Mr. Klock referred, page 37-A, it says for the second time that Section, the section governing manual recounts appears to conflict with the sections that set a deadline, and it's reconciling that conflict.

MR. HANCOCK: Yes.

QUESTION: Whether it was wrong or right, that's what it said its mission was and that's what it did.

MR. HANCOCK: Yes. Both in words and in operation, the statutes could not work together because of the time for requesting manual recounts, the extent of the job manual recounts --

QUESTION: What is the section that requires manual recounts?

MR. HANCOCK: It's 102. -- well, 102.166 authorizes manual recounts.

QUESTION: That's different from requires.

MR. HANCOCK: Yes, but once it starts, Justice Scalia, once it's authorized, if the initial sample recount shows an error that might effect the outcome of the election --

QUESTION: Then --

MR. HANCOCK: The board is then required to, among other things, conduct a full manual recount.

QUESTION: No, no. It's required to do one of three things, one of which could be a manual recount. It could decide to do one of the other two instead.

MR. HANCOCK: Yes. The problem faced by the counties --

QUESTION: So there is really -- there is -- I mean, the Court says that there is a requirement for a manual recount but I don't see anything in the text of the statute that requires a manual recount.

MR. HANCOCK: The statute requires that the election officials attempt to discern the cause of the error. Here the cause of the error was that, in these counties, was that the machines were not able to read ballots, 10,000 ballots in Palm Beach County, the machine did not read as including a vote for president. That was the issue so that the solution to that was not the machines, even when they're operating properly would not read these ballots, so what was left of the county canvassing boards then was to do the full manual recount, and the language of that statute again says they shall do a full manual recount in those circumstances.

QUESTION: It says that the board may authorize the manual recount, it doesn't require it. If it does

authorize it, then it tells it how to do it and says they shall appoint as many counting teams as necessary, presumably as necessary to do it within the time limit.

MR. HANCOCK: Yes, Justice O'Connor, but, again these -- under the law these requests can be made up to the time of canvassing -- that means up to six or seven days -- and also the number of ballots at issue here are between 650,000 in Palm Beach County and also 900,000, up to 900,000 in Broward County.

QUESTION: If that is a statutory problem, the court's resolution didn't really solve it, did it? Because even with her extended time period the same statutory problem exists. There still isn't enough time under the extended deadlines for some of these counties that have an enormous number of votes to conduct a manual recount, isn't that right?

MR. HANCOCK: Well, let me --

QUESTION: I mean to resolve a supposed conflict in the statute in a manner that leaves in place the same problem that existed before seems to me not a real resolution of the statutory problem.

MR. HANCOCK: The supreme court tried to blend it all together to make it work, Justice Scalia, and again it came up with a solution. The Secretary of State's argument here is based on -- the Secretary of State

herself recognized that she had the discretion under Florida law to accept returns filed outside of that seven-day deadline. A breakdown of the machines, in her view, would justify late returns. A failure of the machines to read ballots would not justify late-filed returns.

The supreme court said that the legal standard she was using was wrong. That -- we submit that that decision of the supreme court is the law in the state of Florida.

QUESTION: I'm going to extend your time two minutes, Mr. Hancock, because you haven't had a chance to say a lot yet.

MR. HANCOCK: Well, I don't need the extension time, Your Honor. If there's no other questions, I will stop. Thank you.

QUESTION: Thank you. Mr. Tribe, we will hear from you.

ORAL ARGUMENT OF LAURENCE H. TRIBE

ON BEHALF OF THE RESPONDENTS AL GORE, JR.

AND FLORIDA DEMOCRATIC PARTY

MR. TRIBE: Mr. Chief Justice, and may it please the Court:

I think I would want to note at the outset that the alleged due process violation which keeps puffing up

and then disappearing and has as far as I can tell not appeared at the state supreme court, did make one appearance in the reply brief here, is really not before the Court, and for understandable reasons, because although it is part of the popular culture to talk about how unfair it is to change the rules of the game, I think that misses the point when the game is over, and when it's over in a kind of photo finish that leaves people unsure who won, and then the question is, how do you develop great, sort of greater certainty, and a rather common technique is a recount, sometimes a manual recount, sometimes taking more time would be rather like looking more closely at the film of a photo finish. It's nothing extraordinary. It's not like suddenly moving Heartbreak Hill or adding a mile or subtracting a mile --

QUESTION: You're seeing no important policy in 3 U.S.C. Section 5.

MR. TRIBE: No, no.

QUESTION: In fact, we can change the rules after -- not important -- the popular culture --

MR. TRIBE: Certainly not, Justice Kennedy, but I read U.S.C. Section 5 -- that is 3 U.S.C. Section 5 not as a requirement that, for example, one never add resources to checking how a particular ballot was cast. If you look at the language, I think it's really much too

casual to say of it that all of the laws must stay fixed in order to have the safe harbor apply. As I'll try to argue in a few minutes, that's not really a question for this Court, but for the Congress, but the language of Section 5 is that -- and I'll just read what I think are the key words, "if a state --"

QUESTION: Can you tell us where you're reading from?

MR. TRIBE: Actually, I'm just reading from a copy of the U.S. Code, 3 U.S.C. Section 5, not from any -- the page I can identify --

QUESTION: It's in the appendix to the petitioner's brief, I'm sure, isn't it?

MR. TRIBE: Yes, although I'm afraid I don't have it in front of me.

QUESTION: Page 3A of the blue brief.

MR. TRIBE: Thank you, Justice Souter. Page 3A of the blue brief, I am reliably informed.

So if any state --

QUESTION: That won't get you an extra two minutes.

MR. TRIBE: Well, I tried. I tried. If any state shall have provided, and then it says by laws enacted prior to the day fixed for the appointment of the electors, a fancy way of saying election day, for the

final determination of any controversy or contest about the appointment of electors -- and here's the key phrase, I think -- by judicial or other methods or procedures at least six days before the time fixed for the meeting of the electors, that means in our situation, December 12, then the final determination shall be conclusive and govern the counting in Congress.

Now, the question for Congress, I suppose, would be, although I don't see how this Court could get into that question at this stage, but the question would be, is a particular change extending a deadline for exigent circumstances because a recount has been authorized, a change in the judicial or methods of procedures for resolving the contest.

QUESTION: Let me just ask you a moment, you say you don't think the statute permits this Court to get into the matter at this time. Are you suggesting there could be any judicial review of a decision by the Congress to count one set of electoral votes?

MR. TRIBE: No, I don't think so, Mr. Chief Justice, it's just that I don't trust my own imagination to have exhausted all possibilities. For example, in the case in, I think it was 1890, in Fitzgerald v. Green when this Court held that only states can punish fraudulent voting for presidential electors, it got into the act sort

of obliquely and at an angle, and that had a bearing on the question of how the presidential electoral slate might be composed, but it certainly didn't get into this.

QUESTION: No, it certainly was quite different from --

MR. TRIBE: Very.

QUESTION: -- this hypothetical.

MR. TRIBE: That's certainly right.

QUESTION: You suggest in your reply brief that it is not -- I think you said it's not self-evident that the Florida legislature at this time has the right to appoint any slate of delegates because the Congress has set the date, and the date is the general election day.

If that is so, doesn't this mean that when we talk -- think about justiciability, we must be very careful to preserve the role of the Court. You have said or suggested here in your reply brief that the Florida legislature now has no role. You are now suggesting that this Court has no role. That means the Supreme Court of Florida is it, so far as a judicial interpretation of the consequences of 3 U.S.C. Section 5.

MR. TRIBE: Well, Justice Kennedy, first of all I do want to be clear that in our view the question of whether and when and how the Florida legislature can enter the picture is in no way presented here. That paragraph

was intended to suggest that it's not obvious that the views of some that there's no problem is right.

Secondly, if it were the case that the Florida legislature could not simply decide, well, we're tired of all this counting, we're moving in, and that this Court cannot decide whether the conditions of 3 U.S.C. Section 5 are met, it would then remain only for Congress to make a determination and adding the Florida legislature would not, after all, have added an adjudication.

QUESTION: And my point is that puts hydraulic pressure on your nonjusticiability argument and makes it a very, very important argument and a critical argument in this case.

MR. TRIBE: Well, perhaps, Justice Kennedy, but I frankly can't see how it would affect the decision in this case. After all, you have before you a judgment of the highest court of the state. As Justice Ginsburg and others have suggested, it would ordinarily be the case, surely, that one would not go out of one's way to read the judgment as a breach of faith with the duties of trying to reconcile provisions that are --

QUESTION: Well, I guess in the area, though, of presidential electors it could be that that court, as all courts would be, have to be informed, at least, by the provisions of Section 5 in reviewing the laws enacted by

the legislature of the state. I mean, it had to register somehow with the Florida courts that that statute was there and that it might be in the state's best interest not to go around changing the law after the election.

MR. TRIBE: Well, Justice O'Connor, I certainly agree that if the Florida Supreme Court adverted to 3 U.S.C. Section 5, and as Justice Kennedy asked earlier, got it wrong, then there would be a Federal issue for this Court. Would it be, I wonder, a Federal issue --

QUESTION: Well, is there a Federal issue if the Court doesn't --

MR. TRIBE: No. The answer is no.

QUESTION: -- advert to that?

MR. TRIBE: It would be nice. But remember it is --

QUESTION: Because of Article II, which, after all, does give the legislature plenary power and must have wanted -- it must have wanted to have the laws in place so that it wasn't -- so that Florida wouldn't risk losing its electoral votes. I mean, the legislature had to want that by enacting laws, and perhaps the Florida court has to be aware of the consequences to the state of changing the rules.

MR. TRIBE: But, Justice O'Connor, under Article II, Section 1, Clause 2, the authority to regulate the

manner of the choice of electors is vested in the state legislature. If the state legislature decides from the beginning to exercise that authority by instructing the various institutions, certainly not just the courts, the attorney general, the secretary of state, in very particular ways to exercise their roles in the process, with a specific view of --

QUESTION: Well, it certainly did by enacting that date. Here is the certification date. How could it have been clearer?

MR. TRIBE: Well, I suppose it could be a violation of Florida law if the enactment of that date is construed as a direction to a particular authority like the secretary of state or the state's highest court to take certain actions in order to get the benefit of this bonus, but only a violation of Federal law. I don't see how you got a --

QUESTION: What Florida law would that be?

MR. TRIBE: Of state law. I'm sorry.

QUESTION: Are you talking about the Florida Constitution?

MR. TRIBE: Well, it might have been a violation --

QUESTION: But then you run into the Blacker case.

MR. TRIBE: But it seems to me that the Federal question, which is really what brings us here, can only arise if 3 U.S.C. Section 5 is something other than what Mr. Olson called the indemnification of the state.

QUESTION: It can also arise under the section of the Constitution that was construed in Blacker. That's quite independent of 3 U.S. 5.

MR. TRIBE: That's right, if one concluded that Florida had violated its duty to empower the legislature to take these regulatory steps.

QUESTION: If one concluded that the Florida legislature had relied on the state constitution in a way that the Blacker case says it may not in construing the statute.

MR. TRIBE: I think that's possible, Mr. Chief Justice, but the judgment before you doesn't provide even an inkling, I think of proof about those matters. All we have --

QUESTION: That's what we have been arguing --

QUESTION: As to whether it does or whether it doesn't.

MR. TRIBE: Well, I think we have been arguing several interrelated things. One of the things we have been arguing is whether one could in good faith reach the conclusion, novel as it was in some respects, as Justice

O'Connor points out, that the Florida Supreme Court reached. Now, if the answer to that question was no, perhaps if there were a due process issue in this case, and if someone had a protectable interest that was injured, that would be relevant. But the Federal question that makes that relevant here would arise only if one forgot that 3 U.S.C. Section 5 is all carrot and no stick.

QUESTION: No. I don't agree with you on that, Mr. Tribe. It seems to me a Federal question arises if the Florida Supreme Court in its opinion rather clearly says that we are using the Florida Constitution to reach the result we reach in construing the statute. I think Blacker is a strong argument they can't do that.

MR. TRIBE: Well, that they can never avert to their own constitution?

QUESTION: Well, certainly it stands for the proposition you couldn't do it then, in those circumstances.

MR. TRIBE: Well, what would it be, I wonder, about the circumstances here that would say that in reconciling these provisions which at first we were told were mandatory, then we were told they are not mandatory, they give discretion, and now we are told that the real issue is simply did the court in putting a boundary on that discretion, do something federally impermissible.

What would it be about that sequence that would implicate --

QUESTION: Well, you know, if the Supreme Court of Florida simply said in its opinion, look, these sections of the statute conflict, we've got to under our judicial principles resolve it one way or the other, but -- but it doesn't say that. It goes on to say, look, in the light of the Florida Constitution and the general rights conferred there, we are construing it this way.

MR. TRIBE: It seems to me that as a tiebreaker, as a way of shedding light on the provisions that are in conflict, so long as it's not done in a way that conflicts with a Federal mandate, they are not violating any --

QUESTION: Mr. Tribe, I don't -- I don't agree with that. I don't -- I don't think that the Florida Supreme Court used the Florida Constitution as a tool of interpretation of this statute. If you look at its opinion, it's separated into, into various sections, issues; IV, legal opinion of Division of Elections; V, the applicable law; VI, statutory ambiguity; and that's -- and VII, legislative intent. That's the section where they construe the statute in view of these ambiguities and so forth.

That section concludes, under this statutory scheme, the county canvassing boards are required to

submit their returns to the department by 5 p.m. of the seventh day following the election. The statutes make no provision for exceptions following a manual recount. If a board fails to meet the deadline, the secretary is not required to ignore the county's returns, but rather is permitted to ignore the returns within the parameters of this statutory scheme.

So what the statutory interpretation gives you is a firm termination date of December 7th and discretion in the secretary. The opinion continues, VIII, the right to vote. The text of our Florida Constitution begins with a declaration of rights. And it goes on to say that to the extent the legislature may enact laws regulating the electoral process, those laws are valid only if they impose no "unreasonable or unnecessary" restraints on the right of suffrage contained in the Constitution. In other words, I read the Florida court's opinion as quite clearly saying, having determined what the legislative intent was, we find that our state constitution trumps that legislative intent. I don't think there is any other way to read it, and that is, that is a real problem, it seems to me, under Article II, because in fact there is no right of suffrage under, under Article II. There is a right of suffrage in voting for the legislature but Article II makes it very clear that the legislature can itself

appoint the electors.

MR. TRIBE: It seems to me that it's already been conceded that the legislature can delegate that function to the judiciary. And when Justice Kennedy asked if it can delegate the function to the judiciary, and that is what McPherson seems to suggest, then can it not delegate something less, that is, can it not give the judiciary a role of the sort that it's exercising here? After all, the legislature, and this is important -- it's not true in every state -- the legislature itself repromulgates the Constitution every several years and then it's ratified by the people.

QUESTION: Isn't there another -- go on.

QUESTION: No. That's all right.

QUESTION: Isn't there another way of looking at what the Florida court did, and that was in effect to apply the statute, the interpretative criterion, that where there is any discretion for interpretation, an unconstitutional result should be avoided, and because you have here a statute as I understand it that regulates both Federal and state recounts, that much is, I think is clear.

MR. TRIBE: Right.

QUESTION: The only way to avoid an unconstitutional meaning of the statute so far as Florida

law was concerned was to get into this constitutional concern about preserving the franchise, and that because the legislature intended one standard to cover both Federal and state recounts, it therefore is valid to consider the state constitution in order to derive a general meaning that will apply to a Federal, as well as a state election. Can you look at it that way?

MR. TRIBE: I fully accept that, Justice Souter. I'd supplement it with one important point. We are not dealing here with a decision in which within the gray area where a court could reasonably go either way, this court simply said we don't care about these Federal considerations. It in particular exercised its equitable powers in favor of the Petitioner in order to facilitate meeting the December 12 deadline while still being able to have electoral contests. That December 12 deadline comes purely from Federal law.

QUESTION: Can you -- can you just go back to your characterization of the opinion. I think we would all agree that given that the legislature has to select the manner, a state can't say, our Constitution selects the electors. I suppose that's --

MR. TRIBE: That's right.

QUESTION: All right, but thinking of this opinion, suppose the court had said, look, we reach our

result based on the canons we found in Blackstone. Now, nobody is going to say they said Blackstone is selecting the electors, right?

MR. TRIBE: I think that makes sense.

QUESTION: All right. Now, I suppose they said, we reached this decision based on the values found in the Constitution. That would be like Blackstone. But suppose they say, well, the legislature wants us to do X, but our Constitution requires us to do not X. That might be different.

MR. TRIBE: It might be different.

QUESTION: Now, what is it that they have done here?

MR. TRIBE: I certainly don't think they have done the third. They did not say -- I think when they underscored the presence of language that Justice Scalia read about what's mandatory, they were simply being candid about the fact that they were acting in conflict with one part of the statute, but the adjacent --

QUESTION: It's in a separate section of the opinion, Professor Tribe, that is entitled the right to vote. It is after the legislative intent section and it says categorically, to the extent the legislature may enact laws, they are invalid. And I suggest perhaps the reason that the court did it is that however expansive the

doctrine of constitutional doubt is, there is no way that it can make December 7 mean anything except December 7. I mean, they were almost constrained to use the constitution to override the, the firm deadline --

MR. TRIBE: Justice Scalia --

QUESTION: -- that was explicitly set forth in the constitution.

MR. TRIBE: Justice Scalia, both you and I think at one point Justice O'Connor, in pointing to the particular dates that came out differently under the approach that this Court used from what would have emerged if they had looked only at 102.111 are making a mistake, with all respect. It's not as though this Court promulgated a rule for the future about December 7th in commemoration of Pearl Harbor, we say December 7 is the day. No. What they did was say we have to find a date which will accommodate these conflicting statutory provisions and policies in light of what our constitution tells us, and we surely -- it would amaze, I would think amaze this Court to see anyone saying that because an opinion was organized under Roman numeral headings --

QUESTION: Professor Tribe --

MR. TRIBE: -- in such a way that --

QUESTION: Isn't it also true, Professor Tribe, that part 8 of the opinion relies on four things -- the

Florida Constitution, earlier Florida decisions construing statutes, an Illinois case, and a Federal case.

MR. TRIBE: Absolutely.

QUESTION: Not just their constitution.

MR. TRIBE: That's right, and surely --

QUESTION: Is it also true that the inability to use Section 7 depended in the Florida Supreme Court's reasoning not on the existence of the constitution as the sole reason, but on the inability to make the December 7 date final and provide for the recounts within the times in which recounts can be called for. What I'm saying is, didn't they say that the date of the 7th cannot stand, not because of the constitution alone but because there are other provisions in the statute that cannot be accommodated with sections -- with the 7 date?

MR. TRIBE: Exactly. And I guess to take a broad --

QUESTION: They said that twice, and I think that's critical if you add to that that we read a decision of a state court in the light most favorable to that court and not in the light least favorable. I suppose there would be a possibility for this Court to remand for clarification, but if there's two readings, one that's questionable, one that isn't, all of our decisions suggest that we read the one --

MR. TRIBE: Especially, I think, Justice Ginsburg, when the odds that these conceivable Federal problems are indispensable to this result, are overwhelmingly negative. It's not as though one cannot explain the result this Court reached in the most conventional standard ways, and the fact that --

QUESTION: Professor Tribe, I would feel much better about the resolution if you could give me one sentence in the opinion that supports the second of these supposed alternative readings, that supports the proposition that the Florida Supreme Court was using the constitutional right to vote provisions as an interpretive tool to determine what the statute meant. I can't find a single sentence for that.

MR. TRIBE: Justice Scalia, I can do a little better than find a sentence. The entire structure of that part of the opinion, as Justice Stevens points out, would be incoherent if the constitution was decisive. That is the highest law in Florida. Why bother with all the rest if that is anything more than an interpretive guide.

QUESTION: You would bother with it because having decided very clearly what the statute requires and finding no way to get around the firm dates set, you say the reason it's bad is because of the state constitution. That's how it's written.

MR. TRIBE: But, Justice Scalia --

QUESTION: They might have tried it another way, but it seems to me they didn't --

MR. TRIBE: They also say that the provision that reaches the result that conflicts with the authorized recounts was written in 1951, that in 1989 they wrote a provision that unmistakably created discretion, and we haven't yet discussed this provision, also created the provision that when the returns are filed late, it doesn't say throw them away, it doesn't say give them back, it says fine every member of the canvassing board $200 a day. That would be a totally crazy provision. As this opinion understands, if you were not to reach a reconciliation of this sort, this result was overdetermined under Florida law. It might be true that they said the constitution also points this way, but there isn't a sentence in the opinion that suggests that without that constitutional argument the result would have to be different.

QUESTION: What is the November 26th date? Is that the seven day date moved or is that some kind of a date that tries to reconcile the ultimate point after which the Secretary in exercising her discretion no longer has to accept the late returns? Did it move the date from the statute? Has it created a new date about this discretion? What is it?

MR. TRIBE: Well, it looks to me like an exercise of the chancellor's foot, as it were, in this particular case. When I saw the date, November 26th, I couldn't come up with an algorithm or a formula that would generate it, but the court was confronted with the task of drawing, as this Court has recognized, what are sometimes inevitably arbitrary lines; that is, it said it was not consistent with the overall scheme of the statute to require these recounts, which had just begun, to terminate. That truly would be a promise to the ear to be broken to the hope, like a munificent bequest, Justice Jackson said --

QUESTION: If the legislature --

MR. TRIBE: -- in the pauper's will. Why tell people the count if you won't count it?

QUESTION: And if the legislature had jumped into the breach and said this same thing, would that be a new statute or new enactment under 5 U.S.C.?

MR. TRIBE: I -- honestly, Justice Kennedy, I'm not sure because the language that I quoted from 3 U.S.C. Section 5 focuses on the institutional dispute resolution arrangement that is in place, and if you look at the legislative history in the decade of hearings in the period after the Hayes-Tilden debacle, that history focused on the importance of having a fixed tribunal which

you could look to rather than one cooked up at the last moment, and indeed what they seem to be most afraid of was the political entry of legislators and executives at the 11th hour. There was no focus at all.

QUESTION: But are you saying you can't tell us whether they, in the hypothetical, supposed that it would be a new enactment?

MR. TRIBE: Well, there are certainly no cases on the subject. The language gives me very little guidance. Since the section is addressed to Congress, neither my opinion about it nor the Court's opinion is necessarily --

QUESTION: You don't think you could tell us what you might advise the Congress if you were the counsel for the Judiciary Committee.

MR. TRIBE: I think I would advise the Congress that it is not a new enactment, that it is an entirely reasonable construction of an existing enactment as to which the only alternative construction is to make it self-destruct, and to make it internally contradictory, and I honestly don't think if I were advising Congress that I would say it's a new construction.

I do think, also, that some people reasonably could argue the contrary, and I guess I think that this language should be interpreted whether by a court or by

Congress in a way that gives some deference to the state government and its organs, and I think any degree of deference here is inconsistent with saying that there's been a Federal violation, especially when -- I want to remind us all about the context. Are we going to say that this paragraph in this opinion says that Florida is in breach of Article II of the Constitution in general? Hard to say. I don't think so.

QUESTION: There should perhaps be some deference, though, to the concept expressed in Article II, that it is the authority of the legislature and some special concern about what the legislature may have said.

MR. TRIBE: Yes, but if the legislature is entirely happy not to completely delegate this power to the courts, which Article II would permit, but rather to allow the courts to exercise a somewhat more flexible role than the one that the critic of this opinion would be embracing. That's within the power of the legislature of Florida.

QUESTION: Yeah, but who would have thought that the legislature was leaving open the date for change by the court? Who would have thought that?

MR. TRIBE: Anyone. If you just read the statute in 1989 and it says may. It says she may reject the late returns.

QUESTION: That doesn't change -- that's not the date.

MR. TRIBE: No, the date is the one from which the may is measured. That is, you're supposed to get it in by seven days later. What if you don't? Well, if you don't, she may or she may not reject them. Now, anybody reading that would realize that's a deadline only in a kind of Pickwickian sense. It's not a real deadline. She's got discretion. Certainly if there's an act of God of the sort Justice -- was it Justice Stevens? -- asked about --

QUESTION: Yes, well, then the Secretary came in and argued and said, yes, her discretion was if it were an act of God or a machine breakdown she would exercise her discretion.

MR. TRIBE: And it's an entirely normal exercise of judicial interpretation to say that this statute is not limited to God and machines.

QUESTION: Professor Tribe, can I ask you why you think the Florida legislature delegated to the Florida Supreme Court the authority to interpose the Florida Constitution? I mean, I -- maybe your experience with the legislative branch is different from mine, but in my experience they are resigned to the intervention of the courts, but have certainly never invited it.

MR. TRIBE: Well, I have to say my experience parallels that --

QUESTION: What makes you think the Florida legislature affirmatively invited the Florida Supreme Court?

MR. TRIBE: The odd thing is that the system in Florida involves their own repromulgation of the constitution, and their scheme with respect to the resolution of disputes over elections draws a sharp distinction between elections to their own House and Senate, which they won't trust the courts with as far as they can throw them. Those are to be resolved exclusively in the House and Senate, and all others are to be resolved in the courts under a standard that they understandably preferred.

QUESTION: They are resigned, that they are resigned to, but they need not be resigned to the Florida Supreme Court interposing itself with respect to Federal elections, they need not be because the Florida Constitution cannot affect it. And I -- I just find it implausible that they really invited the Florida Supreme Court to interpose the Florida Constitution between what they enacted by statute and the ultimate result of the election.

MR. TRIBE: Well, I suppose if they were at all

far-sighted, if they looked at their own work and saw how self-contradictory it was, they might say we would want someone with the authority to reconcile these provisions to do so in the light not only of the literal language but of the fact that they are dealing with something very important, the franchise, that disenfranchising people, which is what this is all about, disenfranchising people isn't very nice.

QUESTION: Wouldn't justice --

MR. TRIBE: And it violates the Federal as well as the state Constitution.

QUESTION: But wouldn't Justice Scalia's suggestion be a stronger suggestion if they had dealt by the statute only with Federal elections or only with a presidential election as opposed to dealing with both state and Federal in the same statute?

MR. TRIBE: Well, it's not uncommon, given the convenience of having similar regulations apply on election day not to bifurcate. Oregon v. Mitchell, after all, confronted the nation with a problem --

QUESTION: Right. But when they -- when they don't bifurcate, it's reasonable to suppose that they expect their statute to be construed, number one, as one statute, not as having different dates for different, for state and Federal; and, number two, to be construed so far

as the state concern arises in accordance with the state Constitution, and if that is so, then the result is they would expect a state constitutional concern to inform their interpretation of a statute which ultimately governs Federal as well as state.

MR. TRIBE: And they would recognize that when the Federal election involved the presidency of the United States with the special problems of the Electoral College deadline, they might emerge with rather different deadlines and to some extent a different approach for the -- to elections.

QUESTION: But there are already different deadlines for Federal elections, aren't there, because of the Federal statute concerning overseas ballots?

MR. TRIBE: Yes. That's -- that's entirely true.

QUESTION: So that's, that's going to be different anyway.

MR. TRIBE: And there is an administrative order --

QUESTION: But it's as a result of Federal law, isn't it?

MR. TRIBE: Well, there is a consent decree arising out of Federal law. There was the Federal general statute --

QUESTION: But it wasn't the legislature's choice, it was Congress' choice that required that.

MR. TRIBE: That's right. In 1986, there was a congressional statute that already created that difference.

QUESTION: Mr. Tribe, before you finish, I would like to know whether you are conceding some of the things you said. Sounds like maybe you are. But the Florida legislature under Article II, Section 1, could say we don't want any judicial review of anything about the manner in which we say electors should be appointed. Does the Florida legislature have the authority to cut out judicial review?

MR. TRIBE: No. No, I certainly don't think so. They cut out judicial review -- even this may not be entirely consistent with the Florida Constitution. They cut out judicial review for the election of their own members in the House and Senate. I certainly don't think they would have the authority to expel the Federal judiciary from the election of senators and representatives.

QUESTION: No. I mean the state judiciary. The state judiciary. When it says each state shall appoint electors in such manner as the legislature thereof may direct.

May the legislature direct as to the Florida Supreme Court, and Florida Supreme Court we don't want you to review whatever we do?

MR. TRIBE: I'm not actually clear about that, Justice Ginsburg. I have thought about it a lot. It seems to me that under Smiley v. Holm and similar cases, the general principle is that the Constitution takes the state government and its arrangement as it finds it, and that when the legislature is identified, that really does not mean the legislature in some specialized capacity, as with Article V.

Now, if that's the case and if it's therefore assumed that the legislature is surrounded with both executive and judicial authority, then a decision by the legislature to completely exclude the judiciary from any possible role, the state judiciary, might be inconsistent with the underlying meaning of Article II itself.

QUESTION: Well, could the state legislature at least now say in light of all this confusion, we enact a law today saying this is the way electors will be selected? Is that open to the legislature now?

MR. TRIBE: I'm not sure. That's very much like my inability to answer because I honestly have not reached a conclusion that it's not presented by this case. I don't know whether the legislature could do the further

thing of naming electors, and if it doesn't do that --

QUESTION: Thank you, Mr. Tribe.

MR. TRIBE: Thank you, Mr. Chief Justice.

QUESTION: Mr. Olson, you have four minutes remaining.

REBUTTAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONER

MR. OLSON: Thank you, Mr. Chief Justice. May it please the Court: It seems to me that it's very difficult to read the Florida Supreme Court decision as saying anything else other than the Florida Constitution in their view, in that court's view, is trumping everything else. The second paragraph of the conclusion says because the right to vote is the preeminent right in the declaration of rights of the Florida Constitution and so forth, this opinion is full of language --

QUESTION: But suppose they refer to the declaration of the rights of man, to 1789, the French revolution, I mean, the right to vote is a value in the constitution. Are they actually saying -- I didn't see it?

MR. OLSON: They are sayihng --

QUESTION: Or are they are saying the statute means one thing, but the statute is unconstitutional because the Constitution of Florida says the opposite. I

didn't see that.

MR. OLSON: I think that the only reasonable fair reading of the decision is that the Florida Supreme Court felt that, and it says it over and over again, that we are going to be -- attempt to discern the will of the people, the will of the electorate and discern, and enhance in whatever way we possibly can the right to vote. And because of that, these provisions of the statute which are very much quintessentially legislative, the timetables that are involved in this statute, particularly the November 14th deadline, is a part of a composite package. There is one week for a protest and certain recounts to the extent that they can be done and there are four weeks for contests.

When the Florida Supreme Court truncated, when the Florida Supreme Court expanded the protest period from 7 days to 19 days, it necessarily limited the contest period to a shorter period of time. It changed the discretion. It allowed certain things to occur that couldn't have occurred and it justifies all of those things on the grounds that the Florida Supreme Court, the Florida Constitution trumps those legislative concerns, and that's why it said we are not going to be dissuaded by hypertechnical statutory considerations. So the court was doing what this Court said in the McPherson vs. Blacker

case that it cannot do, allow itself to insert itself or the Florida Constitution over what is required by Article II, Section 1 of the Constitution.

It also seems to me quite evident in response to what Justice Kennedy was asking earlier, that there was concern about the Federal statutory provision, the language to which I think Justice Kennedy was referring is on page 32-A of the appendix to the petition from the court's decision, and there is a footnote there that does refer to reference to 3 U.S.C. 1 through 10, which of course includes Section 5, and it says so in conjunction with the statement that the exercise of the discretion by the secretary of state could not be done in such a way that would preclude Florida voters from participating fully in the Federal electoral process. The court was assuming, it seems to me, that it did not, was not conflict -- the decision that it was rendering was not going to cause a conflict with the Federal statutory scheme, and it was, we submit, in error in that regard.

So the -- the -- to sum up with respect to this, the Florida Supreme Court radically changed the legislative scheme because it thought it could do so under the Florida Constitution. By doing so, it acted inconsistently with Article II of the Constitution, and inconsistently with Section 5 of Title III, and it has

brought about precisely the circumstances that Section 5 of Section 3, Title III, was designed to avoid.

QUESTION: As I look in the conclusion, the paragraph on page 37-A, where they summarize what they said, there is nothing there about the Florida Constitution. It's only about the Florida election code. They say they must construe the Florida election code as a whole, and they point out the provisions in conflict. There is not one word in that paragraph that says anything about the Florida Constitution.

MR. OLSON: The very second paragraph refers to the Florida Constitution and the rights to vote. Page 36-A of the appendix to the petition.

CHIEF JUSTICE RHENQUIST: Thank you, Mr. Olson. The case is submitted.

(Whereupon, at 11:30 a.m., the case in the above-entitled matter was submitted.)

December 4, 2000
United States Supreme Court Sets Aside Florida Supreme Court Ruling

Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 00–836

GEORGE W. BUSH, PETITIONER *v.* PALM BEACH COUNTY CANVASSING BOARD ET AL.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

[December 4, 2000]

PER CURIAM.

The Supreme Court of the State of Florida interpreted its elections statutes in proceedings brought to require manual recounts of ballots, and the certification of the recount results, for votes cast in the quadrennial Presidential election held on November 7, 2000. Governor George W. Bush, Republican candidate for the Presidency, filed a petition for certiorari to review the Florida Supreme Court decision. We granted certiorari on two of the questions presented by petitioner: whether the decision of the Florida Supreme Court, by effectively changing the State's elector appointment procedures after election day, violated the Due Process Clause or 3 U. S. C. §5, and whether the decision of that court changed the manner in which the State's electors are to be selected, in violation of the legislature's power to designate the manner for selection under Art. II, §1, cl. 2 of the United States Constitution. 531 U. S. ____ (2000).

On November 8, 2000, the day following the Presidential election, the Florida Division of Elections reported that Governor Bush had received 2,909,135 votes, and respondent Democrat Vice President Albert Gore, Jr., had re-

ceived 2,907,351, a margin of 1,784 in Governor Bush's favor. Under Fla. Stat. §102.141(4) (2000), because the margin of victory was equal to or less than one-half of one percent of the votes cast, an automatic machine recount occurred. The recount resulted in a much smaller margin of victory for Governor Bush. Vice President Gore then exercised his statutory right to submit written requests for manual recounts to the canvassing board of any county. See §102.166. He requested recounts in four counties: Volusia, Palm Beach, Broward, and Miami-Dade.

The parties urged conflicting interpretations of the Florida Election Code respecting the authority of the canvassing boards, the Secretary of State (hereinafter Secretary), and the Elections Canvassing Commission. On November 14, in an action brought by Volusia County, and joined by the Palm Beach County Canvassing Board, Vice President Gore, and the Florida Democratic Party, the Florida Circuit Court ruled that the statutory 7-day deadline was mandatory, but that the Volusia board could amend its returns at a later date. The court further ruled that the Secretary, after "considering all attendant facts and circumstances," App. to Pet. for Cert. 49a, could exercise her discretion in deciding whether to include the late amended returns in the statewide certification.

The Secretary responded by issuing a set of criteria by which she would decide whether to allow a late filing. The Secretary ordered that, by 2 p.m. the following day, November 15, any county desiring to forward late returns submit a written statement of the facts and circumstances justifying a later filing. Four counties submitted statements and, after reviewing the submissions, the Secretary determined that none justified an extension of the filing deadline. On November 16, the Florida Democratic Party and Vice President Gore filed an emergency motion in the state court, arguing that the Secretary had acted arbitrarily and in contempt of the court's earlier ruling. The

following day, the court denied the motion, ruling that the Secretary had not acted arbitrarily and had exercised her discretion in a reasonable manner consistent with the court's earlier ruling. The Democratic Party and Vice President Gore appealed to the First District Court of Appeal, which certified the matter to the Florida Supreme Court. That court accepted jurisdiction and *sua sponte* entered an order enjoining the Secretary and the Elections Canvassing Commission from finally certifying the results of the election and declaring a winner until further order of that court.

The Supreme Court, with the expedition requisite for the controversy, issued its decision on November 21. *Palm Beach County Canvassing Bd.* v. *Harris*, Nos. SC00–2346, SC00–2348, and SC00–2349 (Nov. 21, 2000), App. to Pet. for Cert. 1a. As the court saw the matter, there were two principal questions: whether a discrepancy between an original machine return and a sample manual recount resulting from the way a ballot has been marked or punched is an "error in vote tabulation" justifying a full manual recount; and how to reconcile what it spoke of as two conflicts in Florida's election laws: (a) between the time frame for conducting a manual recount under Fla. Stat. §102.166 (2000) and the time frame for submitting county returns under §§102.111 and 102.112, and (b) between §102.111, which provides that the Secretary "shall . . . ignor[e]" late election returns, and §102.112, which provides that she "may . . . ignor[e]" such returns.

With regard to the first issue, the court held that, under the plain text of the statute, a discrepancy between a sample manual recount and machine returns due to the way in which a ballot was punched or marked did constitute an "error in vote tabulation" sufficient to trigger the statutory provisions for a full manual recount.

With regard to the second issue, the court held that the "shall . . . ignor[e]" provision of §102.111 conflicts with the

"may . . . ignor[e]" provision of §102.112, and that the "may . . . ignor[e]" provision controlled. The court turned to the questions whether and when the Secretary may ignore late manual recounts. The court relied in part upon the right to vote set forth in the Declaration of Rights of the Florida Constitution in concluding that late manual recounts could be rejected only under limited circumstances. The court then stated: "[B]ecause of our reluctance to rewrite the Florida Election Code, we conclude that we must invoke the equitable powers of this Court to fashion a remedy" App. to Pet. for Cert. 37a. The court thus imposed a deadline of November 26, at 5 p.m., for a return of ballot counts. The 7-day deadline of §102.111, assuming it would have applied, was effectively extended by 12 days. The court further directed the Secretary to accept manual counts submitted prior to that deadline.

As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution. That provision reads:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"

Although we did not address the same question petitioner raises here, in *McPherson* v. *Blacker*, 146 U. S. 1, 25 (1892), we said:

> "[Art. II, §1, cl. 2] does not read that the people or the citizens shall appoint, but that 'each State shall'; and

> if the words 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself."

There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, §1, cl. 2, "circumscribe the legislative power." The opinion states, for example, that "'[t]o the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage" guaranteed by the state constitution. App. to Pet. for Cert. 30a. The opinion also states that "'[b]ecause election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote" *Ibid.*

In addition, 3 U. S. C. §5 provides in pertinent part:

> "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the

> counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."

The parties before us agree that whatever else may be the effect of this section, it creates a "safe harbor" for a State insofar as congressional consideration of its electoral votes is concerned. If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors. The Florida Supreme Court cited 3 U. S. C. §§1–10 in a footnote of its opinion, App. to Pet. for Cert. 32a, n. 55, but did not discuss §5. Since §5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

After reviewing the opinion of the Florida Supreme Court, we find "that there is considerable uncertainty as to the precise grounds for the decision." *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 555 (1940). This is sufficient reason for us to decline at this time to review the federal questions asserted to be present. See *ibid.*

> "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases." *Id.,* at 557.

Specifically, we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, §1, cl. 2. We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U. S. C. §5. The judgment of the Supreme Court of Florida is therefore vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

December 8, 2000
United States Supreme Court Review of Petition in Touchston v. McDermott

No. _____

In The

Supreme Court of the United States

ROBERT C. TOUCHSTON, DEBORAH SHEPPERD, and DIANA L. TOUCHSTON, *Petitioners*,

v.

MICHAEL MCDERMOTT, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

Certified Florida election results for Presidential Electors contain votes reconstructed pursuant to Fla. Stat. § 102.166 ("the Manual Recount Statute"). The Supreme Court of Florida may imminently order the Florida Secretary of State to certify more votes reconstructed under this statute. The U.S. Court of Appeals for the Eleventh Circuit refused preliminary and permanent injunctive relief to voters claiming vote dilution, which raises three substantial federal questions warranting immediate review by this Court:

1. Whether the dilution of a voter's vote without more constitutes irreparable harm.

2. Whether the manual recount provisions of the Manual Recount Statute create an unconstitutional two-tiered system for counting votes by allowing a candidate to seek, and willing county canvassing boards in their absolute discretion to grant, manual recounts of votes in only selective vote-rich counties to the partisan advantage of one candidate, thus diluting and debasing the vote of those who voted in counties where no manual recount would be conducted.

3. Whether the Manual Recount Statute is unconstitutional because it: (a) lacks standards circumscribing a county's power to grant or deny a manual recount; (b) lacks standards to determine a valid vote during a manual recount, resulting in the use of vague, subjective, arbitrary and capricious standards, developed ad hoc and ex post facto, to count votes cast contrary to instructions given voters in the voting booth and contrary to the standards used to count votes in past elections; and (c) fails to provide fundamental fairness and due process to the non-requesting candidate and voters.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Robert C. Touchston, Deborah Shepperd, Diana L. Touchston; *Plaintiffs-Appellants*;

George W. Bush, as candidate for president; *Intervenor-Appellee* (did not file notice of appeal so as to be listed as appellant);

Michael McDermott, Ann McFall, Pat Northy, Theresa LePore, Charles E. Burton, Carol Roberts, Jane Carroll, Suzanne Gunzburger, Robert Lee, David Leahy, Lawrence King, Jr., and Miriam Lehr, in their official capacities as members of the County Canvassing Boards of Volusia, Palm Beach, Broward and Miami-Dade Counties, respectively ("County Defendants"); Katherine Harris, in her official capacities as Secretary of the Department of State and as a member of the Elections Canvassing Commission; Clay Roberts and Bob Crawford, in their official capacity as members of the Elections Canvassing Commission ("State Defendants"); *Defendants-Appellees*;

The Florida Democratic Party; *Intervenor-Appellee*; and

Attorney Gen. Robert Butterworth (filed ungranted motion to intervene).

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners ("Voters") respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. Because their votes have been diluted by manual recounts under Florida Statute § 102.166, which creates an unconstitutional two-tiered system for standardless "reconstruction" of votes in selective counties, Voters are irreparably harmed. Votes "reconstructed" pursuant to this unconstitutional scheme are already in the totals certified for Presidential electors, and there is imminent threat that more fruit of this poisonous tree will be added to certified totals. Both the legitimacy of the Presidential election – and perhaps the choice of the President – are jeopardized by this unconstitutional statute.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-61a) is reported at 2000 U.S. App. LEXIS 30781 (Dec. 6, 2000). The opinion of the district court (App. 162a-174a) is not yet reported.

JURISDICTION

The judgment of the United State Court of Appeals for the Eleventh Circuit was entered on December 6, 2000. App. 1-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The U.S. Constitution provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. art. II, § 1, cl. 2.

The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Title 3, Section 5 of the United States Code provides: " If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5 (2000).

Title 3, Section 7 of the United States Code provides: "The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct." 3 U.S.C. § 7 (2000).

Title 42, Section 1983 of the United States Code provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial

officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983 (2000).

Pursuant to this Court's Rule 14.1(f), the remaining pertinent provisions of Florida election law involved in this case, including Fla. Stat. §§ 102.111, 102.141, 102.155, 102.166(1)-(7), 102.168, and 103.011, are set forth at App. 199a-211a.

STATEMENT OF THE CASE

Petitioners, three voters who cast their vote for Governor George W. Bush in the 2000 general election and who reside in Brevard County, Florida, sought a preliminary injunction in the U.S. District Court for the Middle District of Florida, invoking the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1343(a). The injunction would prohibit Florida's Secretary of State, members of Florida's Election Canvassing Commission, and certain county canvassing boards from certifying the results of the November 7th general election for President, using the results of any manual recount of votes pursuant to the Manual Recount Statute. The district court has denied the preliminary injunction, and the U.S. Court of Appeals for the Eleventh Circuit has affirmed the district court's denial of the preliminary injunction.

I. The Election and the Results.

On Tuesday, November 7, 2000, Voters went to the polls with other citizens of Florida and the United States to cast their votes for Presidential Electors. The initial tally of the ballots cast in Florida, excluding absentee ballots, resulted in the Republican candidate for President, Governor Bush, receiving 2,909,135 votes. The Democratic candidate for President, Vice President Albert Gore, Jr., received 2,907,351 votes, producing a difference of 0.0299 percent in the number of votes received by the two

candidates. App. 5a. Because Vice President Gore was defeated by less than 0.5 percent, Florida law required an automatic statewide recount of the votes. *See* Fla. Stat. § 102.141(4). Upon completion and certification of the automatic statewide recount on November 14, 2000, Governor Bush retained the lead, although the margin had diminished considerably to 300 votes, with 2,910,492 for Governor Bush and 2,910,192 for Vice President Gore. App. 5a . On November 18, 2000, the counties completed and certified the overseas absentee ballot count to Florida's Department of State, resulting in a lead for Governor Bush of 930 votes: 2,911,872 for Governor Bush and 2,910,942 for Vice President Gore. App. 6a n.4 .

However, on November 21st, the Florida Supreme Court ordered that all manual recount totals that had been completed and submitted to the Elections Canvassing Commission by 5:00 p.m., November 26th must be accepted by the Secretary of State and added to the final votes. App. 6a. On the evening of November 26th, the Election Canvassing Commission certified that Governor Bush had received 2,912,790 votes and that Vice President Gore had received 2,912,253 votes, making Governor Bush the recipient of Florida's 25 electoral votes by a margin of 537 votes. App. 6a.

II. Manual Recounts and Challenges to the Election.

Although the State Defendants have certified Governor Bush as the recipient of Florida's 25 electoral votes, whether he continues to be entitled to those electoral votes remains in doubt because of several manual recounts and legal contests to the certified results brought by Vice President Gore, the Florida Democratic Party, and/or voters and taxpayers who supported the Vice President.

A. *Florida's Manual Recount Statute.*

The manual recounts arise from provisions in Fla. Stat. § 102.166, which allows a candidate in a statewide election, but not a voter, to request a manual recount of ballots cast in counties selected by that candidate or the candidate's political party. The candidate requesting the manual recount must choose three precincts to be recounted, and "[i]f the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (a) Correct the error and recount the remaining precincts with the vote tabulation system; (b) Request the Department of State to verify the tabulation software; or (c) Manually recount all ballots." Fla. Stat. § 102.166(5). However, no county canvassing board is required to grant the request for a manual recount. Indeed, "the canvassing board has unrestricted discretion to grant or deny a sample manual recount of three precincts." App. 8a. If a manual recount is granted, counting teams and county canvassing boards are to conduct the manual recount in such a manner as to "determine a voter's intent in casting a ballot." Fla. Stat. § 102.166(7)(b). No Florida statute contains instructions or standards to guide the counting teams or the canvassing boards as they attempt to determine the voter's intent.

B. *Challenges By Way of Manual Recount Requests.*

Governor Bush has requested no manual recounts. However, pursuant to the Manual Recount Statute, the Florida Democratic Party requested manual recounts for certain precincts in Volusia, Palm Beach, Broward, and Miami-Dade Counties, all containing a heavy concentration of Democratic voters. App. 9. The requests were granted, and the four counties began manually recounting the votes to "determine a voter's intent in casting a ballot." Fla. Stat. § 102.166(7)(b). Since there are no instructions or standards to guide this determination, each county evaluated the ballots

under different, sometimes shifting, standards that allow vague, subjective, arbitrary, and capricious determinations of voter intent in these counties. This changing approach differs from the objective and unequivocal standard applied by these counties before the manual recounts there and contrary to the instructions for voting that the voter received in the voting booth – namely, that voter was to cast her vote by punching through the ballot card in the hole designated for the voter's chosen candidate.

III. The Proceedings Below.

On November 13, 2000, Voters filed their complaint and motion for a preliminary injunction, requesting "a judicial declaration that Fla. Stat. § 102.166(4) is unconstitutional (both on its face and as applied) because it debases their votes and the votes of those similarly situated and thereby denies them rights guaranteed by the Fourteenth Amendment." App. 11a. They also requested the court to enjoin the certification, by either the County or State Defendants, of any vote totals that included results from any manual recount in Volusia, Palm Beach, Broward, or Miami-Dade Counties. The district court denied Voters' requests, holding that no "valid basis for intervention by federal courts" had been presented and that the "requisite elements for the entry of a preliminary injunction" had not been established. App. 171a-172a . Particularly, the district court found no likelihood of success on the merits and no irreparable harm. App. 173a.

The Court of Appeals affirmed the district court's denial on the same grounds that it affirmed the denial of a preliminary injunction in *Siegel v. LePore*, a companion case brought by Governor Bush and several Florida voters decided the same day, holding that there had not been a showing of abuse of the district court's discretion in finding no irreparable harm to Plaintiffs. App. 76a-87a.

REASONS FOR GRANTING THE PETITION

I. This Case Involves Matters of Great Importance, Including the Right Not to Have One's Vote Diluted and Who Shall Be President of the United States of America.

The constitutional rights claimed by Voters are guaranteed by the Fourteenth Amendment to the U.S. Constitution, and "the Civil Rights Act of 1871 throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." *Mitchum, DBA Book Mart v. Foster*, 407 U.S. 225, 240 (1972) (citation omitted). The Civil Rights Act, 42 U.S.C. § 1983, "was intended to enforce the provisions of the Fourteenth Amendment 'against State action . . . whether that action be executive, legislative, or judicial.'" *Id*. (*quoting Ex parte Virginia,* 100 U.S. 339, 346 (1879)) (emphasis omitted). Furthermore, this Court has specifically agreed that "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in overturning of a state policy." *Zablocki, Milwaukee County Clerk v. Redhail*, 434 U.S. 374, 380 (1978).

Given the political sensitivity and national attention this case is subject to, when considered in conjunction with the fundamental constitutional rights at stake and the local passions and prejudices engendered by the issues raised, the federal courts are the best forum in which to hear Voters' claims. As the U.S. Supreme Court pointed out in *Mitchum*, in cases such as the current election controversy, "the United States courts are further above mere local influence than the [state] courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of vicinage . . . they will be able to rise above prejudices or bad passions or terror more easily." *Mitchum*, 407 U.S. at 241

(*quoting* comments of Rep. Coburn re Civil Rights Act of 1871, from *Cong. Globe*, 42d Cong., 1st Sess., 460 (1871)).

Thus, because the vitally important right to vote is at stake here, and because the resolution of this case may determine the next President of the United States, this case involves matters of great importance, and this Court should grant this writ.

II. The Courts Below Erred in Denying Injunctive Relief, Disregarding the Irreparable Harm of Vote Dilution.

The Court of Appeals denied Voters' request for a preliminary and permanent injunction on the sole ground that Voters had failed to demonstrate that they were "suffering serious harm or facing imminent injury." App. 79a. The court majority stated that voters had not claimed that they were "prevented from registering to vote, . . . from voting or . . . from voting for the candidate of his choice. . . . [n]or . . . that [a] vote was rejected or not counted." App. 79a-80a. Thus, the court below based its holding, *sub silenco*, on its apparent belief that the Plaintiffs' claim of vote dilution, alone without more, is just not enough. In addition, the court below held that, "[e]ven assuming Plaintiffs can assert some kind of injury, they have not shown the kind of serious and immediate injury that demands the extraordinary relief of a preliminary injunction." App. 80a (emphasis in original). Apparently, the majority was referring to their holding that, "[a]t the moment, the candidate Plaintiffs [in *Siegel v. LePore*] (Governor Bush and Secretary Cheney) are suffering no serious harm . . . because they have been certified as the winners of Florida's electoral votes." App. 79a. On these grounds, the Court of Appeals found no irreparable injury.

A. *Voters Suffer Irreparable Injury.*

As shown below, the ruling of the court below that Voters have suffered no irreparable injury is erroneous.

1. Vote Dilution Itself Is an Irreparable Injury.

In holding that vote dilution, alone without more, is not an irreparable injury, the Court of Appeals stated that "[t]he only areas of our constitutional jurisprudence where we have said that an on-going violation may be presumed to cause irreparable injury involve the right of privacy and certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether." App. 81a.

The Court of Appeal's holding, however, is contrary to the decisions of this Court in *Moore v. Ogilvie*, 394 U.S. 814 (1969) (requirement that independent candidates for President and Vice President submit petitions with signatures from each of 50 of 102 counties unconstitutionally discriminates against voters in more populous counties by diluting their votes), and *Dept. of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (census plan that would result in loss of House seat constitutes an Article III injury in fact to citizen of affected state by dilution of vote). Both cases held that voter dilution is in itself a constitutionally cognizable injury warranting injunctive relief. The dilution of votes by manual recounts in selected counties at issue here is no less constitutionally offensive than the potentially discriminatory petition requirements at issue in *Moore v. Ogilvie* or proposed census sampling at issue in *Dept. of Commerce v. U.S. House of Representatives* regardless of the outcome of election, petition drive, or census sampling.

Second, vote dilution should be deemed an irreparable harm based on other existing precedents. State action that denies or chills the exercise of First Amendment rights is in itself deemed an irreparable harm. *Elrod v. Burns*, 427 U.S. 347 (1980). The Eleventh Circuit majority concedes this much. App. 81a. Plainly, the right to vote also implicates the exercise of First Amendment rights. Indeed, it is difficult to imagine a clearer example of

political expression than voting. As Circuit Judge Tjoflat noted, "First Amendment concerns are raised when political speech in the form of a vote is attributed to a person who intended to refrain from voting, as would occur, for example when a dimpled ballot is counted for a particular candidate in a selective manual recount." App. 33a n. 44 (*quoting Pacific Gas & Electric Co. v. Public Util. Comm'n*, 475 U.S. 1, 16 (1986)).

Selective manual recounting diminishes the value of votes in a manner similar to state actions that limit, but do not altogether prohibit, the exercise of First Amendment rights. It is true that the exercise of First Amendment rights might be limited by reasonable "time, place, or manner" restrictions, but no legitimate or reasonable state interest is served by the dilution of votes that occurs under selective manual recounts conducted in a fundamentally unfair way. Moreover, depriving the Plaintiffs here a preliminary injunction when the very real and imminent harm of vote dilution threatens them, due to resumed selective manual recounts, is closely analogous to a rule that would demand that no injunction issue against a threatened deprivation of First Amendment rights until a penalty against their exercise is actually imposed, rather than merely threatened. Such a rule would be directly contrary to First Amendment doctrine that permits injunctive relief against conduct that "chills" the exercise of First Amendment rights. *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988). For the same reasons that any cognizable threatened injury to the exercise of First Amendment rights is deemed irreparable, therefore, vote dilution should likewise be regarded as an irreparable harm in itself, thus warranting preliminary injunctive relief.

It is not "wholly speculative as to whether the results of those recounts may eventually place Vice President Gore ahead," as the Court of Appeals asserts. App. 79a. The intended objective of the selective manual recounts is obviously to assure, to the

extent possible, that Vice President Gore will thereby triumph, as Circuit Judge Carnes aptly demonstrates. *See* App. 75a-99a.

The Voters are thus threatened with further imminent injury: Should the Florida Supreme Court order resumption of manual recounts, their votes will be progressively diluted in precisely the manner that the requested selective manual recounts contemplate. This in itself constitutes a cognizable injury regardless of what the outcome of the election might be.

The Court of Appeals also asserts that immediate injunctive relief should be available to a voter only when the voter is "prevented from registering, . . . prevented from voting or prevented from voting for the candidate of his choice," or claims "that his vote was rejected or not counted." App. 80a. Arbitrarily restricting immediate injunctive relief in such a manner, however, is contrary to the decisions of this Court since *Reynolds v. Sims*, 377 U.S. 533, 535 (1964) ("the right of suffrage can be denied by a debasement or dilution of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise").

The appellate court claims further that, even if voter dilution represents an injury warranting injunctive relief, it does not warrant a preliminary injunction because whatever harm suffered by the Voters "unrelated to the outcome of the election . . . can be adequately remedied later." App. 80a. It is true, of course, that a permanent injunction, issued by the District Court later, will prevent irreparable harm *in future elections*. However, this is to no avail regarding this election, which is what the preliminary injunction is all about. Any hope that a permanent injunction would remedy any injury caused the Voters by this election has already vanished, if it ever existed.

In any case, awaiting a remedy "later" for this election would very possibly involve serious disruption of the political and public order. It would also severely prejudice against the Voters the outcome of any evidentiary hearing, because of the disruption that

might result in a finding favorable to the Voters. *See Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1975) (new election ordered after state supreme court ordered exclusion of absentee and shut-in ballots in violation of U.S. Constitution). Such projected scenarios prompt the conclusion that a constitutionally cognizable claim of voter dilution should properly be regarded as an *irreparable* injury warranting preliminary injunctive relief in order to remove the offending votes from the certified totals before the election is final.

A cognizable claim of vote dilution should be regarded as threatened irreparable harm for the additional reason that it cannot be later remedied through the award of money damages. The harm to Voters cannot reasonably be repaired by providing them money damages. The vote dilution that Voters are currently suffering from and are threatened with, as further explained below, should be sufficient for irreparable injury. Thus, the court below erred, and this Court should decide this important issue.

2. Voters Currently Suffer Irreparable Harm and the Imminent Threat of Further Irreparable Harm.

Voters here, in fact, now suffer irreparable harm and imminent threat of further irreparable harm by dilution of their votes for President due to constitutional defects in Florida's Manual Recount Statute. The results of Volusia's and Broward's manual recounts are currently included in the statewide certified totals, App. 13a, and Vice President Gore is currently petitioning the Florida Supreme Court to include additional results of manual recounts, both past and future, in the certified totals. App. 212a. Vice President Gore claims that if the results of these manual recounts were included in the statewide totals, he would be certified the winner of Florida's electoral votes. App. 222a, 226a.

This harm arising from the dilution of the Voters' votes is irreparable because of the deadlines imposed by the scheduled

certification of Presidential Electors on December 12, 2000, and the ensuing vote of the Electoral College on December 18, 2000. Because the dilution of Voters' votes is occurring in the context of a Presidential election, any remedy must be swift in order to be adequate. While most elected offices carry ongoing powers which are exercised over a period of several years, the singular power of a Presidential Elector to cast Florida's votes in the Electoral College must be performed on December 18, or be forever lost. As such, any vote dilution which is allowed to continue through December 18 will become permanent and irreparable.

Furthermore, the certified results provide the baseline for any contest proceeding, such as that currently lodged in the Florida Supreme Court. App. 212a-233a. Since the certified totals already include the results of manual recounts from Broward and Volusia Counties, Governor Bush's lead is reduced by 635 votes. His present lead of 537 would be 1,172 absent the manual recounts. The certification of such results causes very real harm because, according to Florida election contest law, "there is a presumption that returns certified by election officials are presumed to be correct." *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1975). As a result, in a contest proceeding, the certified totals place the burden "clearly on the contestor [Governor Bush] to establish that the ballots [manually recounted] have been irregularly cast." *Id.* This presumption is sufficiently strong that "ballots cannot be used to impeach an official return made by election managers unless the integrity of the ballots is first clearly established by the person who seeks to use the ballots for the purpose." *Burke v. Beasley*, 75 So. 2d 7, 9 (Fla. 1954). This presumption of accuracy is also reflected in Florida statutes, which declare that a "certificate of election which is issued to any person shall be prima facie evidence of the election of such person." Fla. Stat. § 102.155.

As a result, the effect of including the results of manual recounts in the totals certified is to shift the burden of proof as to the validity of these votes from Vice President Gore to Governor

Bush during the contest proceedings. Since who bears the burden of proof often determines the outcome, this shift in burden could be outcome determinative. Therefore, it also creates an ongoing constitutional injury to the Voters.

In addition to these existing injuries, a serious threat of further harm continues to loom in the form of the election contest proceedings being pressed by Vice President Gore. The complaint filed in that case claims that a net gain of approximately 1,800 votes should be certified, all but 51 of which are based upon manual recounts conducted or requested under the manual recount statute. App. 214-15a. His contest complaint claims that the difference between his certified vote total and that of Governor Bush was "entirely the result of" four errors in the tabulation and certification process. *Id.* This contest complaint claims that Vice President Gore was denied a net gain of 375 votes from "rejecting the results of the complete manual count in Palm Beach County . . . and the results of a manual count of approximately 20 percent of the precincts in Miami-Dade County," App. 215a; more than 800 votes from "not counting approximately 4,000 ballots in Palm Beach County . . . that the Palm Beach County Canvassing Board reviewed but did not count as a vote (in the manual recount)," App. 215a; and approximately 600 votes from "not counting approximately 9,000 ballots in Miami-Dade County . . . which were never counted manually because the Miami-Dade County Canvassing Board prematurely ceased its manual count." *Id.*. The complaint later explains that the failure to conduct and/or certify each of these manual counts "results in the unlawful rejection of legal votes," App. 222a, 229a, 232a. The complaint also claims that the challenged actions "violated section 102.166(5)(c)," App. 229a; and that this statute "required" that officials count ballots which they did not. App. 221a.

In contrast to the 1,775 votes claimed based upon the dictates of the Manual Recount Statute, the complaint claims only a net of approximately 50 votes not attributable to manual recounts. As

such, the fact that this Nation does not at this moment have a clear "President-Elect" is entirely due to the prospect that additional votes will be certified as a result of Florida's manual recount statute. The only way that Vice President Gore claims he can become President is with the aid of selective manual recounts authorized by this statute.

The Manual Recount Statute is also working irreparable harm through its discriminatory impact on the ability to mount an election contest. Where Vice President Gore has been able to mount an effective contest to the election, this has been possible only because of his ability to rely on vote information gathered through the manual recounts that he requested during the protest stage. As discussed above, nearly all of the ballots which he seeks to count and certify were identified during manual recounts launched at his request. In contrast, the Voters would have been forced to start from scratch by conducting manual counts of entire counties in any counties they sought to contest – a nearly impossible task given the time constraints, especially considering the 12 day delay in certification ordered by the Florida Supreme Court in *Palm Beach County Canvassing Board v. Harris*, 2000 WL 1725434 at 16, *vacated, Bush v. Palm Beach County Canvassing Bd.*, 2000 WL 1769093 (Dec. 4, 2000). App. 135a.

In addition to identifying select sets of ballots for Vice President Gore's contest, the manual recount proceedings also allowed him to challenge the certified results on the basis that the failure to manually count or certify the results thereof violated the manual recount statute and constituted official misconduct. App. 221a-223a, 229a, 232a. Had Voters attempted to counter this dilution of their votes by seeking similar recounts through a contest proceeding, they would have been unable to point to any comparable violations to justify their efforts.

Of course, Voters' ability to rectify this situation through a contest proceeding is also rendered virtually nil by other statutory

factors. In order to bring a contest to show that legal votes were excluded or that illegal votes were included, Fla. Stat. § 102.168(3)(c) requires a showing that the questioned action was sufficient to "change or place in doubt the result of the election." As Circuit Judge Tjoflat observed in his dissent, this remedy "is no remedy at all for voters who have suffered constitutional injury while attempting to vote for the winning candidate." App. 49a.

This same obstacle also blocks efforts to seek contest recounts of counties with smaller vote margins than those selected by Vice President Gore. As explained at length by Circuit Judge Carnes, manual recounts in Miami-Dade, Broward, and Palm Beach Counties could be expected to possibly change the outcome of the election because of their large size and the high percentage of ballots cast for Vice President Gore. App. 133a. Similar manual recounts in individual counties with smaller populations or vote margins would not meet this standard for either the manual recount or contest proceedings.

Thus, Voters here, in fact, are currently suffering and imminently face further irreparable harm.

3. The Court of Appeal's Decision Creates a Split in the Circuits.

Furthermore, the Eleventh Circuit's decision has created a split in the circuits by its refusal to recognize irreparable harm from the deprivation of a constitutional right, outside of a limited range of First Amendment and right of privacy situations. App. 82a-83a. This holding conflicts with that of other circuits which recognize that the deprivation of equal protection or other constitutional rights *ipso facto* constitutes irreparable harm. The Ninth Circuit has long maintained that "an alleged constitutional infringement will often alone constitute irreparable harm" and that

a district court "could have relied on . . . alleged deprivation of equal protection in its balance of hardships analysis." *Goldie's Bookstore, Inc. v. The Superior Court of the State of California*, 739 F.2d 466, 472 (9th Cir. 1984). More recently, it has found irreparable harm in a claim of "unconstitutional discrimination," noting that money damages could not remedy such an injury. *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997).

The Second Circuit has also found irreparable harm in equal protection violations, noting that it had also done so with regard to violations of Fourth and Eighth Amendment rights. *Brewer v. The West Irondequoit Central School District*, 212 F.3d 738, 744 (2nd Cir. 2000) (*citing Covino v. Patrissi*, 967 F.2d 73, 77 (2nd Cir. 1992)); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2nd Cir. 1996). As the Second Circuit has explained, where "plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary." *Statharos v. New York Taxi and Limousine Commission*, 198 F.3d 317, 322 (2nd Cir. 1999) (right of privacy regarding financial information).

As a result, there is a split in the circuits on this important question that this Court should resolve.

B. *Voters Have Substantial Likelihood of Success on the Merits.*

Voters also have a substantial likelihood of success on the merits, an issue not reached by the Court of Appeals below.

Article II, section 1, of the United States Constitution charges the state legislatures with establishing the manner of appointing Electors for the Office of President and Vice President of the United States. In Florida, while candidates for these offices run statewide, the Manual Recount Statute allows a candidate to request manual recounts in only selected counties. Fla. Stat. § 102.166(4)(a). Thus, the candidate may select for manual recounts

only those counties where the candidate *stands to gain a partisan political advantage*.

The Manual Recount Statute, therefore, creates a two-tiered system of counting votes that will be inherently biased in the requesting candidate's favor and that dilutes the votes cast for the requesting candidate's opponents. As the Attorney General for the State of Florida has explained:

> A two-tiered system would have the effect of treating voters differently, depending upon what county they voted in. A voter in a county where a manual recount was conducted would benefit from *having a better chance of having his or her vote actually counted* than a voter in a county where a hand count was halted.

App. 140a (emphasis added) Butterworth Letter. This effect is exacerbated when the selected counties use a vague, subjective, arbitrary, and capricious standard - developed ad hoc and ex post facto - to count votes contrary to the instructions given to voters in the voting booth and contrary to the standards used to count votes in previous elections.

1. The Two-Tier Manual Recount System Dilutes the Votes of Florida Voters and, Thereby, Denies Them Equal Protection of the Laws.

There are two lines of vote dilution cases, one based on geography, *Reynolds v. Sims*, 377 U.S. 533 (1964), and the other based on "stuffing of the ballot box." *Ex Parte Siebold*, 100 U.S. 371, 379 (1879). Both lines are implicated here.

Moore v. Ogilvie, 394 U.S. 814 (1969), involved geographic vote dilution in the selection process for Illinois' Presidential Electors. This Court held that the process violated equal protec-

tion because it weighted nominating signatures from some counties more heavily than other counties. *Id.* at 816. This created a two-tiered system depending on county residence. "When a State makes classifications of voters which favor residents of some counties over residents of other counties, a justiciable controversy exists." *Id.* "The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.* at 819; *see also Baker v. Carr*, 369 U.S. 186 (1962); *Wesbury v. Sanders*, 376 U.S. 1(1964); *Reynolds v. Sims*, 377 U.S. 533 (1954); *Gray v. Sanders*, 372 U.S. 368, 379 (1968).

Furthermore, the Equal Protection Clause safeguards the rights of voters to have their valid votes counted along with the valid votes of other voters. *United States v. Saylor*, 322 U.S. 385, 388-89 (1944); *United States v. Mosely*, 238 U.S. 383 (1880). However, the Manual Recount Statute allows a candidate in a statewide election to selectively cause the votes in some counties to be counted, while ignoring valid votes in other counties, based on partisan political advantage. Thus, valid votes not counted by the machine will still not be counted in those counties where no manual recount has been requested, while the votes of similarly situated voters in other counties will be counted. Thus, voters in one county are favored over others with a partisan result.[1]

The Manual Recount Statute does not permit the Voters to seek manual recounts in the rest of the state to offset this heavily biased reconstruction of undervotes in the counties selected by one candidate. As a result of the statute's structural flaw, the Voters' votes, and those of hundreds of thousands of other voters

[1]Similarly, in the census sampling cases, this Court held that residents of counties which have fewer undercounts "have a strong claim that they will be injured . . . because their votes will be diluted vis-a-vis residents of counties with larger 'undercount' rates." *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 344 (1999).

throughout Florida, will be irretrievably diluted in violation of the Equal Protection Clause.[2]

Furthermore, the Manual Recount Statute allows candidates to "stuff the ballot box." Not only does the Manual Recount Statute permit discriminatory selection of counties by the candidate, it compounds the constitutional problem by: (1) failing to provide *any* standards to guide county canvassing boards in deciding whether to grant requests for manual recounts, (2) failing to provide uniform rules for how votes are to be counted if a request is granted, and (3) failing to require notice to opposing candidates and opportunity for them to be heard. Such opportunity for selectivity and failure to incorporate any standards result in a gross lack of fundamental fairness.

Statutes that fail to establish standards that are sufficient to guard against arbitrary and capricious deprivations of liberty interests, partisan decisions, unfairness, and favoritism violate due process. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). The lack of due process that results from the failure of the Manual Recount Statute to incorporate any standard circumscribing county canvassing boards' discretion leads inevitably to the dilution of Voters' vote.

[2]Voters do not challenge *per se* the validity of manual recounts. *See Roudebush v. Hartke*, 405 U.S. 15 (1972). Other States have adopted procedures to ensure fundamental fairness in selecting which counties to manually recount. Indiana, for example, provides that, once a candidate requests a recount of particular counties or precincts, his opponent may file a cross-petition requesting a recount in other counties or precincts. Ind. Code §§ 3-12-6-4 and 6. Both recounts must be granted. *See also* 10 Ill. Comp. Stat. Ann. 5/23-23. In Maryland, if an election outcome is changed by a recount, an opposing candidate may demand his own recount of votes in precincts not specified by the petitioner. Md. Code Ann., Elections § 12-102 (1999); *see also* 21-A Me. Rev. Stat. Ann. tit. 21-A § 737-A (1999); N.J. Stat. Ann. § 19:28-4 (2000).

First, the Manual Recount Statute gives absolute discretion to the county canvassing boards on whether to grant such requests. Fla. Stat. § 102.166(4)(c); *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508 (Fla. App. 1992). Thus, Democrat boards are under no statutory compulsion to deny Democrat candidates' requests for manual recounts when such candidates received the most votes in that county, even when such requests are not predicated on a failure of the voting tabulation system to accurately count votes, but are simply transparent attempts to mine for votes.

Second, there are no standards in the statute on how to manually count the votes. Inherent in the right to vote is having the vote counted in a manner consistent with the voter's intent. *See United States v. Mosely*, 238 U.S. 383, 385 (1915); *United States v. Classic*, 313 U.S. 299, 315 (1941). The Constitution protects these rights and nullifies any state law that denies these rights to its citizens. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

The only statutory guidance in conducting the visual inspection of the ballot to determine the vote is provided in Fla. Stat. § 102.166(7)(b): "[i]f the counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent." Thus, the Manual Recount Statute permits county canvassing boards to use different rules, over time or even within the same county, resulting in fundamental unfairness. Moreover, counties are free to adopt vague, subjective, arbitrary, and capricious test and change them after the election, if they choose. This lacks due process and dilutes Voters' votes.

In this case, the canvassing boards in Broward and Palm Beach Counties had pre-existing procedures for counting punch-card ballots that required that at least one corner of the chad be dislodged. In Palm Beach County, the canvassing board had a ten-

year-old official written policy that was in place on November 7th to this effect:

> The guidelines assume that these directions [to voters on voting machines] have been understood and followed. Therefore, a chad that is hanging or partially punched may be counted as a vote, since it is possible to punch through the card and still not totally dislodge the chad. But a chad that is fully attached, *bearing only an indentation, should not be counted as a vote*. An indentation may result from a voter placing the stylus in the position but not punching through. Thus, an indentation is not evidence of intent to cast a vote.

Florida Democratic Party Appendix, Tab 8, Exhibit A (emphasis added). This was based on the instructions given the voter in the voting booth. When manual recounting of the votes was initiated, it was done in accord with the standard adopted in 1990. However, the Florida Democratic Party obtained a court order requiring that dimpled chads be counted as votes. Appellants' Request to Take Judicial Notice, Attachment A and C.

In Broward County, voters were similarly instructed and had a previous policy to only count ballots that were perforated. However, two local judges ordered that dimpled ballots be counted. Appellants' Supplemental Request To Take Judicial Notice, Attachment H, pages 9-10.

Fundamental unfairness results from counting reconstructed ballots cast contrary to voting instructions. These county-issued voting instructions are relied on by voters to ensure that votes will be correctly counted for the candidate the voter intended to select. *See Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998); *cf. Hendon v. North Carolina State Board of Elections*, 710 F.2d 177, 180 n. 4 (4th Cir. 1983). The voting instructions presented a clear way for voters to make their choice for President. Voters who did not choose to vote (an undervote) for a Presidential candidate could do so by not punching through the ballot. "It is beyond

belief to suggest that thousands of voters" who did not punch out the chip or chad "were secretly relying on the hope that their votes would[] be counted." *Bennett*, 140 F.3d at 1228.

Not only does the Manual Recount Statute not employ an objective standard, it does not delineate *any* standard for the manual counting of ballots, allowing counties to use any standard they choose. When ballots are ambiguous (ballots not completely punched through), county canvassing boards have attempted to subjectively divine the intent of the voter by employing various methods. This practice is subjective because there are two equally plausible explanations if ballots are not punched through: that the voter was too weak to punch through the ballot or that the voter made a mistake or changed her mind. It is arbitrary and capricious to pick one intent over another when faced with such ballots. Such an approach also fails to recognize those voters who deliberately choose not to vote for any Presidential candidate, while permitting canvassing boards to impute to such voters an intent to vote for a particular candidate.

Opposing candidates are statutorily prevented from protecting the integrity of the vote from manipulation by candidates and election officials conducting selective manual recounts of votes. Most importantly, the Manual Recount Statute requires that the candidate demonstrate that the results of the recount "could affect the outcome of the election." Fla. Stat. § 102.166(5). A winning candidate could not do this.

Furthermore, these requests must come "prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of election day, whichever occurs later." Fla. Stat. § 102.166(4)(b). County canvassing boards also have complete discretion to select additional precincts to be manually recounted. Fla. Stat. § 102.166(4)(d). If the 72 hour time period has elapsed, a non-requesting candidate may not counter with requests for manual recounts in other precincts or

counties. Nor does a candidate possess any recourse if the county board decides to expand the manual recount to other precincts.

Thus, the Manual Recount Statute permits partisan county canvassing boards to decide to manually recount targeted precincts in order to increase the votes of candidates after the favorable results of the candidate-requested manual recount are known, while opposing candidates from contesting this manual recount or requesting recounts in other counties. The effect of all this is to unconstitutionally weight the votes of voters in some counties over those of others.

2. This Court Should Exercise Jurisdiction Because This Case Involves Systematic Denial of Equality In Voting.

The right of suffrage is "a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1885). Thus, voting in local and state elections is subject to constitutional protection, *Phoenix v. Kolodziejski*, 399 U.S. 204, 209 (1969), specifically, the protection of the Equal Protection Clause. *See Reynolds*, 377 U.S. at 544. Thus, while the Constitution delegates to the States the primary power and responsibility to conduct and police their own elections, U.S. Const. art. I, § 4, cl. 1, where the state action is one "that systematically den[ies] equality in voting," rather than an "episodic event[]," a violation of the equal protection clause is found. *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980).

Because this Court is asked to remedy through a "constitutional lens" a broad-gauged, systemic, fundamental unfairness that infects the results of a state election, rather than to examine the validity of individual ballots or supervise the administrative details of the election, it should properly exercise jurisdiction. Thus, this Court should accept this case for review and then reach the merits. *See Thornburg v. American College of Obstetricians & Gynecologists*, 467 U.S. 747 (1986).

C. *The Balance of Harms Favors Voters.*

The balance of harms weighs heavily in favor of the Voters and other similarly situated voters. If the injunction does not issue, Voters' votes for Electors will be diluted through the manual recount of a candidate-selected set of undervotes in four heavily populated, predominately Democratic counties while the undervotes in sixty-three counties will be completely uncounted, "depriv[ing] voters of their right to vote based on their county of residence and thereby den[ying] them equal protection of the laws." App. 38a. This scheme "allows candidates to play games with individual rights" and "contravenes the long-settled principle that '[q]ualified citizens not only have a constitutionally protected right to vote, but also the right to have their votes counted.'" App. 37a.

As this Court has noted:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote - whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he cast his ballot in favor of one of several competing candidates, underlies many [United States Supreme Court] decisions.

Gray v. Sanders, 372 U.S. 368, 379-80 (1963).

In addition, by counting the candidate-selected set of undervotes, such a scheme "infringes upon the plaintiffs' right, and the right of all voters, to associate for the advancement of

their favored political candidate." App. 44a. The right of individuals to associate for the advancement of political beliefs . . . ranks among our most precious freedoms." *Williams v. Rhodes,* 393 U.S. 23, 30 (1968). Voters' votes for Electors are diluted and their "right of political association is diminished when other votes for [the same Electors] are not counted." App. 45a.

On the other hand, election officials have no constitutionally legitimate interest in affording greater weight to candidate-selected votes than to the votes of similarly situated voters throughout the state. As state and county officials, their interests should be on the side of ensuring that all votes throughout the state are given equal weight. Because the dilution of Voters' votes may possibly affect the outcome of the election, the wrong candidate may take office. This factor is heavily in favor of Voters.

D. *The Public Interest Requires Injunctive Relief.*

The public interest favors the equal weighting of all of the ballots cast in a statewide race, and even more so in a Presidential race. "An executive like the President has broad discretion; he has the power to affect every voter, and thus every voter must be permitted to vote and have his ballot *both counted and equally weighed*." App. 56a n. 66 (emphasis added).

Furthermore, this Court in *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983), specifically recognized that "in the context of a Presidential election, state imposed restrictions implicate a uniquely important national interest." As the *Anderson* Court pointed out:

> The president and the vice president of the United States are the only elected officials who represent *all* voters in the Nation. Moreover, the *impact of the votes cast in each State is affected by the votes cast for the various candidates in*

> *other States*. Thus, in a Presidential election, a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will largely be determined by voters beyond the State's boundaries.

Id. (emphasis added).

Under the Manual Recount Statute, manual recounts may be requested by partisan political candidates, not to ensure that every valid ballot throughout the state is counted along with all of the others, but to seek a partisan political advantage. "[T]he system encourages candidates to cherry-pick — to carefully select the counties in which to request that ballots be manually examined for [under]votes." App. 23a. "A candidate will want [under]votes counted in counties where he captured a greater proportion of the machine tabulated vote than did his opponent, because the candidate can expect that he will likely take a similar proportion of the [under]votes." *Id.* In the absence of the injunctive relief sought by Voters, a disproportionately high number of undervotes in four heavily populated, predominately Democratic counties will be added to the statewide vote total, while the valid undervotes throughout the rest of the state will not be counted at all.

This result is contrary to the one-person-one-vote principle and is, therefore, contrary to the national public interest in the equally weighed selection of the President. As this Court has explained, "the idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Ogilvie*, 394 U.S. at 819.

Further, stopping selective and manipulable recounts serves the public interest by halting their continuing erosion of the public trust in our electoral system. The seemingly endless process of

multiple recounts has produced a strong appearance of corruption, in which public officials are widely viewed as acting out of their own partisan political interests rather than for the common good as their obligations of office demand. Reducing or preventing such an appearance of corruption is a critical public interest which would be well served by promptly enjoining these unconstitutional recounts and use of their fruit. As this Court has stated in addressing other aspects of the electoral process:

> Leave the perception of impropriety unanswered, and the cynical assumption . . . could jeopardize the willingness of voters to take part in democratic governance. Democracy works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."

Nixon v. Shrink Missouri Government PAC, 120 S. Ct. 897, 908-09 (2000) (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

So important is this public interest in avoiding the appearance of corruption by public officials that even limitations on a form of political expression – contributions to candidates – which were found to involve "'significant interference' with associational rights, could survive" where the state showed the limit to be drawn to stem an appearance of corruption. *Shrink Missouri PAC*, 120 S. Ct. at 904-05 (*quoting Buckley v. Valeo*, 424 U.S. 1, 28 (1976)).

An appearance of corruption presents a sufficiently powerful public interest to justify restraints that "operate in an area of the most fundamental First Amendment activities" and where the "First Amendment affords the broadest protection." *Buckley*, 424 U.S. at 14. If this interest is sufficient to impose restraints on our most precious First Amendment freedoms, then it certainly justifies an injunction to prevent the Manual Recount Statute from

violating fundamental rights to equal protection under the law. Therefore, the public interest is served by the issuance of an injunction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 8, 2000
Brief in opposition for respondent Florida Democratic Party,
Petition in Touchston v. McDermott

No. 00-942

IN THE

Supreme Court of the United States

Robert C. Touchston *et al.*,
Petitioners,

v.

Michael C. McDermott *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT FLORIDA DEMOCRATIC PARTY

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Only on exceedingly rare occasions has this Court reviewed a court of appeals order affirming the denial of a preliminary injunction. It should not do so here. The question presented in the Eleventh Circuit was painfully narrow in the first instance: whether the district court abused its discretion in denying a preliminary injunction on the abbreviated and untested record before it. But that question now has narrowed to the point of irrelevance in light of the Florida Supreme Court's decision in *Gore* v. *Harris*, No. SC00-2431, Slip op. (Dec. 8, 2000). Moreover, review of this federal court judgment would be particularly inappropriate in light of principles of comity and federalism, including specifically the *Rooker-Feldman* doctrine.

Pursuant to the "contest" provisions of the Florida elections code, see Fla. Stat. § 102.168, the Florida Supreme Court in that case ordered, *inter alia*, that manual counts of undervotes be conducted in any Florida counties that have not previously conducted such counts. The result is that the manual recounts challenged here and conducted under Fla. Stat. § 102.166 (the "protest" provisions), even if they had been halted as requested by Petitioners, now would be conducted pursuant to court order under the directives of *Gore* v. *Harris*. In any event, the en banc court of appeals properly followed settled law in holding that the district court had not abused its discretion in denying the preliminary injunction. Moreover, because Petitioners were not denied the right to vote or to have their votes counted, they were not irreparably harmed when their bid to deprive other voters of the right to have their votes counted fell short. Petitioners also have failed to meet the other elements required for preliminary injunctive relief. The petition should be denied.

STATEMENT OF THE CASE

1. Background. On November 7, 2000, Florida citizens cast over 5,820,000 ballots in the general election for the President of the United States. Under Florida's election law, the outcome of this election would determine what slate of electors would cast Florida's twenty-five electoral votes for the President of the United States. Based on initial returns transmitted to it by the county canvassing boards of Florida's sixty-seven counties, on Wednesday, November 8, 2000, the Florida Division of Elections ("Division") reported that Governor George W. Bush had received 2,909,135 votes for President and that Vice-President Al Gore had received 2,907,351 votes.

Because the margin between the two leading candidates was less than one-half of one percent of the total votes cast for that office, Florida law required an automatic recount of the ballots. Fla. Stat. § 102.141(4). At the end of this initial automatic recount, the margin between candidates Gore and Bush was reduced from the initially stated 1784 votes to 300 votes.

To recheck the results, Florida law provides that counties may conduct a further manual recount to address "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). Any candidate "may file a written request with the county canvassing board for a manual recount" "prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later." *Id.*

§ 102.166(4)(a), (b). If the county canvassing board grants the request, an initial manual recount is conducted of ballots from three precincts and at least one percent of the total county vote. If the results of the initial manual recount indicate a disparity with the machine count that could affect the outcome of the election, the canvassing board "shall" undertake one of three further steps, including a manual recount covering all precincts in the county. *Id.* § 102.166(5).

In this case, the Florida Democratic Party requested a manual recount in Broward, Miami-Dade, Palm Beach, and Volusia Counties. At the conclusion of the initial recounts, each of the four counties determined that the sample had revealed tabulation discrepancies that could affect the outcome of the election and decided, consistent with the requirements of Section 102.166(5)(c), to manually recount all of the ballots.

2. Procedural History of This Litigation. On November 13, 2000, Petitioners in this case filed a Complaint in the United States District Court for the Middle District of Florida seeking a declaration that Fla. Stat. § 102.166(4) is unconstitutional and an injunction against the manual recounting of ballots for Florida's electors for President in Palm Beach, Miami-Dade, Volusia, and Broward Counties. Alternatively, Petitioners sought an injunction against the use of any such recounted totals in any certified returns. Petitioners also filed a Motion for a Temporary Restraining Order or Preliminary Injunction ("Motion for Preliminary Injunction").

Petitioners are three registered voters residing in Brevard County. Brevard County does not use a punch card voting system; rather, it employs a much more accurate optical scanner system. The named defendants are members of the county canvassing boards of Palm Beach, Miami-Dade, Broward, and Volusia Counties, respectively, along with the Secretary of State and the two other State Election Canvassing Commission

members.

On November 14, 2000, after a hearing on Petitioners' Motion for Preliminary Injunction, the district court issued an order denying Petitioners' motion on the grounds that Petitioners had not established any of the requisite elements for entry of a preliminary injunction. *Touchston* v. *McDermott*, No. 6:00CV1510ORL28C, 2000 WL 1713943, at ** 3-4 (M.D. Fla. Nov. 14, 2000). The district court concluded, *inter alia*, that Petitioners were not likely to succeed on the merits and had failed to demonstrate they would be irreparably harmed if an injunction was not granted. *Id*. The district court adopted the reasoning of the order issued by the Southern District of Florida the previous day in *Siegel* v. *LePore*, No. 00-9009-CIV, 2000 WL 1687185 (S.D. Fla. Nov. 13, 2000), denying a similar request for injunction from other voter parties and Governor Bush and Secretary Cheney. Pursuant to Federal Rule of Appellate Procedure 8(a)(1), Petitioners moved for an injunction pending appeal before the district court. The district court denied that motion.

On November 15, 2000, Petitioners filed a Notice of Appeal from the district court's Order and an Emergency Motion for Injunction Pending Appeal and to Expedite. The Florida Democratic Party moved to intervene and opposed the emergency motion, as did other appellees. On November 17, 2000, after sua sponte setting the case for hearing en banc, the court of appeals denied the motion for injunction pending appeal.

On the same date, the court of appeals denied a motion for injunction pending appeal in the *Siegel* case. Plaintiffs in *Siegel* filed a petition for certiorari before judgment, arguing that the manual recounts violated the Equal Protection and Due Process Clauses and the First Amendment. This Court denied that petition.

After several exhaustive rounds of briefing, including on the impact of the Florida Supreme Court's decision in *Bush* v. *Palm Beach County*, oral argument was conducted before an en banc panel of all twelve judges of the Eleventh Circuit on December 5, 2000. On December 6, 2000, the court of appeals issued its opinions in Petitioners' case, and in *Siegel* v. *LePore*. In *Touchston*, the court affirmed the district court's denial of a preliminary injunction for the reasons set forth in the *Siegel* opinion. Both cases involved the same fundamental issues. The court held that the denial of the preliminary injunctions must be affirmed because "Plaintiffs still have not shown irreparable injury, let alone that the district court clearly abused its discretion in finding no irreparable injury on the record then before it * * * ." *Siegel,* 2000 WL 1781946 at *8. The court pointedly noted that the factual record before the district court consisted of untested affidavits and media reports. Observing that "many highly material allegations of fact [were] vigorously contested," the court held that it could not appropriately consider the merits, *Id.* at n.4, and held that the district court had not abused its discretion. *Id.* at *7.

The court of appeals in *Siegel* held that the *Rooker-Feldman* doctrine, which precludes a lower federal court from reviewing a final state court decision,[1] did not apply to the plaintiffs' challenge to the Florida Supreme Court's decision in *Bush* v. *Palm Beach County Canvassing Bd.*, 2000 WL 1725434 (Fla. 2000), because that decision had been vacated by this Court, see *Bush v. Palm Beach County Canvassing Bd.*, No. 00-836 (Dec. 4, 2000). See *Siegel*, 2000 WL 1781946 at *4.

On December 8, 2000, Petitioners sought a writ of certiorari from this Court.

[1] See *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 482 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416 (1923).

3. The Decisions of the Supreme Court of Florida. After Volusia County and Palm Beach County brought an action against Florida Secretary of State Harris to enjoin her from requiring that manual handcount results be submitted by 5:00 p.m. on November 14, 2000, the Florida Supreme Court issued an order requiring the Florida Secretary of State to accept amended certificates from county canvassing boards reflecting manual recounts if filed by 5:00 p.m. on November 26, 2000 (or by 9:00 a.m. on November 27, at the Secretary's option). *Palm Beach County Canvassing Bd.* v. *Harris*, 2000 WL 1725434 (Nov. 21, 2000). Broward County completed its county-wide manual recount and submitted results to the Secretary of State by that deadline. (Volusia County had submitted its manual recounts in time to meet the initial deadline of 5:00 p.m. on November 14, 2000.) On the evening of November 26, 2000, the Elections Canvassing Commission of Florida certified the vote total of Florida in the presidential race. That certification stated that Governor Bush received 537 more votes than Vice-President Gore. Palm Beach County completed its manual recount, showing a net gain of 215 votes for Vice-President Gore, but these totals were not included in the final certification because they were submitted approximately two hours after the 5:00 p.m. deadline, and the Secretary of State refused to accept them on that basis. Miami-Dade County, after completing a partial manual recount, reversed itself and discontinued its manual count, based upon a determination that it could not complete the count by the deadline.

After granting a petition for certiorari filed by Governor Bush, this Court on December 4, 2000 vacated the Florida Supreme Court's decision and remanded the case for clarification of the basis for the Florida Supreme Court's opinion. This Court expressly declined to rule on the federal questions asserted to be present by Petitioner Bush.

On December 8, 2000, the Supreme Court of Florida issued its opinion in *Gore* v. *Harris*, Case No. SC00-2431 (December 8, 2000). The underlying case was an action filed by Vice-President Gore contesting the certified election results of November 26, 2000 pursuant to Fla. Stat. § 102.168. That case was filed on November 27, 2000, in the Leon County Circuit Court, contesting the certification results on the grounds that they included "a number of illegal votes" and failed to include "a number of legal votes sufficient to change or place in doubt the result of the election." See Fla. Stat. § 102.168(3)(c).

This separate and distinct "contest" proceeding raised five instances in which the official certified results either rejected legal votes or received illegal votes. These were:

(1) The rejection of the 215 net votes for Vice-President Gore identified in the manual count conducted by the Palm Beach County Canvassing Board;

(2) The rejection of 168 net votes for Vice-President Gore, identified in the partial recount by the Miami-Dade County Canvassing Board;

(3) The certification of election night returns from Nassau County, instead of the results of the statutorily mandated automatic recount, resulting in a net gain of 51 votes for Governor Bush;

(4) The rejection of an additional 3300 votes in Palm Beach County, most of which were identified by Democratic observers as votes for Gore, but which were not included in the certified results; and

(5) The refusal to review approximately 9000 ballots from Miami-Dade County, which the counting machine registered as non-votes and which had never been manually reviewed.

Gore v. *Harris*, Slip op. at 4. The Leon County Circuit Court rejected Vice-President Gore's contest action with regard to all relief sought. Vice-President Gore appealed to the First District Court of Appeal, which certified the judgment to the Florida Supreme Court.

The Florida Supreme Court reversed the judgment of the circuit court, holding that "the trial court erred as a matter of law in not including (1) the 215 net votes for Gore identified by the Palm Beach County Canvassing Board (footnote omitted) and (2) in not including the 168 net votes for Gore identified in a partial recount by the Miami-Dade County Canvassing Board." *Id.* The Florida Supreme Court found no error in the trial court's findings regarding the Nassau County votes and the additional 3300 votes in Palm Beach County. *Id.* Finally, the court held that the trial court erred by refusing to examine the additional 9000 ballots from Miami-Dade. *Id.* at 5.

The Florida Supreme Court based its analysis on Florida statutory law, noting that the case was "controlled by the language set forth by the Legislature in section 102.168, Florida Statutes (2000) [the contest statute]." *Id.* at 6. That law provides that one of the grounds for a contest action is "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." Fla. Stat. § 102.168(3)(c). Instead of applying this statutory standard, however, the trial court erroneously required proof of "a reasonable probability that the results of the election would have been changed." See Slip op. at 21-22.

Applying the correct statutory standard to the particular allegations in the case, the Florida Supreme Court first noted that the trial court failed to examine the 9000 Miami-Dade ballots that had never been manually reviewed, presenting Vice-President Gore with "the ultimate Catch-22, acceptance of the only evidence that will resolve the issue but a refusal to examine

such evidence." *Id.* at 31. The court held that "[o]nly by examining the contested ballots, which are evidence in the election contest, can a meaningful and final determination in this election contest be made." *Id.* at 37. With regard to the 215 net votes in Palm Beach County and the 168 net votes in Miami-Dade County, the court held that these partial recount results should be included because the county canvassing boards had identified them as legal votes under Florida law. *Id.* at 34-35. The court declined to disturb the trial court's holdings with regard to the Nassau County vote and the 3300 additional disputed ballots in Palm Beach County.

Addressing the concern that other votes may have gone uncounted in other parts of Florida, the Florida Supreme Court stated that "the ultimate relief would require a counting of the legal votes contained within the undervotes in all counties where the undervote has not been subjected to a manual tabulation." *Id.* at 2. The court further noted that the circuit court can, under Florida statutory law, order all necessary public officials, "in all counties that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith, said tabulation to take place in the individual counties where the ballots are located." *Id.* at 38-39. The court held that any such necessary statewide relief be ordered upon remand. *Id.* at 40.

Finally, the court addressed the standard for tabulating ballots and determining what is a legal vote. Here again, the court relied on the Florida legislature and Fla. Stat. § 101.5614(5), which states that a vote shall be counted as a "legal" vote if there is a "clear indication of the intent of the voter." See *id.*

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED BECAUSE THE UNDERLYING ACTION IS RENDERED IRRELEVANT BY THE FLORIDA SUPREME COURT'S DECISION IN *GORE* v. *HARRIS*, AND THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING INTERIM INJUNCTIVE RELIEF.

I. THE RELIEF SOUGHT IN THE PRESENT CASE HAS BEEN SUPERSEDED BY THE FLORIDA SUPREME COURT'S DECISION IN *GORE* v. *HARRIS*.

The Florida Supreme Court's decision in *Gore* v. *Harris* supersedes Petitioners' request for a preliminary injunction and the underlying action. Petitioners' action was brought to challenge recounts conducted under the "protest" provisions of the Florida election code. See Fla. Stat. § 102.166. *Gore* v. *Harris*, on the other hand, was brought under the "contest" provisions of the Florida election code, see Fla. Stat. § 102.168. The relief granted by the Florida Supreme Court completely supersedes any possible relief that could have been or could be granted in the present case. The Florida Supreme Court ordered that a manual count or tabulation of undervotes be conducted in all counties that have not previously conducted such a manual count or tabulation. Slip op. at 38-39. Thus, the relief Petitioners sought – a halt to manual recounts conducted by the county canvassing boards under Fla. Stat. § 102.166 or, alternatively, an injunction that such recounts not be included in certified vote totals – is no longer relevant. Even if such recounts had been stopped or found to be unconstitutional under Section 102.166, recounts would now be conducted pursuant to the Florida Supreme Court's decision in *Gore* v. *Harris*, under

a completely different statutory provision that is not at issue in this case. Further, Petitioners' professed concern about "selective" recounts has now been fully addressed by the *statewide* relief ordered by the Florida Supreme Court.

While Petitioners no doubt will take issue with *Gore* v. *Harris*, that is a very different case, one that involves different parties, different issues and different provisions of Florida's election code, as the court below recognized. *See Siegel*, Slip Op. at 23 n.10 ("[T]his case involves discretionary recounts ordered by county canvassing boards. A recount ordered by a state court under state law in a contest proceeding might be a substantially different case, raising different legal issues.") In any event, any challenge to *Gore* v. *Harris* lies by means of a petition for writ of certiorari directly to the Florida Supreme Court. A motion to stay the Florida court's judgment pending the filing of a petition for certiorari has already been filed by Governor Bush and Secretary Cheney. If this Court is inclined to review *Gore* v. *Harris*, it obviously will have the opportunity to do so directly.

Finally, principles of comity and federalism counsel strongly against granting certiorari as a way of indirectly challenging the Florida Supreme Court's judgment in *Gore* v. *Harris*. E.g., *Powell* v. *Powell*, 80 F.3d 464, 467 (CA11 1996) (*Rooker-Feldman* doctrine based on "reasons that go to the heart of our system of federalism -- the dual dignity of state and federal court decisions interpreting federal law."); see also *International Eateries of Am.* v. *Board of County Comm'rs of Broward County*, 838 F. Supp. 580, 586 (S.D. Fla. 1993) (principles of abstention and federalism require that courts decline to entertain claims that would disrupt important state administrative and judicial processes); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Publ. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341 (1951); *Younger* v. *Harris*, 401 U.S. 37 (1971).

II. THE COURT OF APPEALS FOLLOWED SETTLED RULES OF FEDERAL PROCEDURE IN AFFIRMING THE DENIAL OF A PRELIMINARY INJUNCTION.

Appellate review of a lower court's decision to grant or deny a preliminary injunction is extremely narrow in scope. A district court's denial of a preliminary injunction may be reversed only if the court clearly abused its discretion. 2000 WL 178416, at *8; see *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (grant or denial of preliminary injunction reviewed under abuse of discretion standard). The reason for affording deference to the lower court stems in part from the nature of a preliminary injunction proceeding:

> "This limited review is necessitated because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief. Weighing these considerations is the responsibility of the district court."

2000 WL 1781946, at *11 (quoting *Gray Line Motor Tours, Inc.* v. *City of New Orleans*, 498 F.2d 293, 296 (CA5 1974) (citations omitted)).

The court of appeals found that deference was especially appropriate in this case because of the undeveloped record: "[O]nly limited affidavits and a few documents were introduced into the record before the district court. No formal discovery has been undertaken, and, as yet, no evidentiary hearing has been held in this case. Many highly material allegations of facts are vigorously contested." *Id.* at *7. Deliberately eschewing a return to the district court to develop the record, Petitioners

instead have clung to "scant evidence" that is "largely incomplete," "vigorously disputed" and untested "by the adversarial process of cross-examination." *Id.* n.7. Petitioners continue to rely on disputed "evidence" in their petition, referring, for example, to voting instructions (allegedly posted on two counties' websites) that were never admitted into evidence. Pet. for Certiorari, *Touchston* v. *McDermott* (Dec. 8, 2000) [hereinafter *Touchston* Pet.] at 22-23. The court of appeals properly affirmed the district court, noting that "an undeveloped record * * * cautions against an appellate court setting aside the district court's exercise of its discretion." *Id.* at *7.

Contrary to Petitioners' assertion, *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), does not support a grant of certiorari to review the merits. *Touchston* Pet. at 25. In affirming the appellate court's decision to review the merits, rather than simply the exercise of discretion by the district court in denying a preliminary injunction, this Court in *Thornburgh* found that the factual record was unusually complete, 476 U.S. at 757, and that the unconstitutionality of the challenged state action was clear, *id*. at 756. The Court noted that a different situation would be presented where "the probability of success on the merits depends on facts that are likely to emerge at trial." *Id*. at 757 n.8. As the court below determined: "This case clearly falls within the latter category * * * . The answer to the constitutional questions is anything but clear. And, in stark contrast to *Thornburgh*, we have before us a factual record that is largely incomplete and vigorously disputed * * * [consisting of] limited affidavits and the submission of a few documents, including news media reports. * * * These evidentiary infirmities are especially problematic given that Plaintiffs' major claims are as-applied challenges to the Florida statutes, arguments the validity of which depends upon the development of a complete evidentiary record." 2000

WL 1781946, at n.4. *Thornburgh* does not permit review of the merits in this case. See also 476 U.S. at 821 (O'Connor, J., joined by Rehnquist, J., dissenting) (on limited record before it, court of appeals should not have invalidated statutory provisions in reviewing denial of preliminary injunction).

While Petitioners express disagreement with the lower court decisions, they make no attempt to demonstrate that the district court abused its discretion in denying the preliminary injunction, The court of appeals properly followed the principle of law that permits reversal of a district court's denial of a preliminary injunction only for abuse of discretion. Even if Petitioners could demonstrate that the court of appeals misapplied this rule, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a rule of law." S. Ct. R. 10. No reason has been provided by Petitioners to depart from this principle.

III. PETITIONERS WERE NOT ENTITLED TO A PRELIMINARY INJUNCTION.

A. Petitioners Failed to Establish Irreparable Injury.

The court of appeals properly affirmed the district court's denial of preliminary injunctive relief because Petitioners had failed to show on the existing record a substantial likelihood that they would suffer irreparable injury if the injunctive relief were denied. 2000 WL 1781946, at *8. The court's conclusion was based upon settled and well-established principles applicable to the grant or denial of preliminary injunctive relief and was the product of sound analysis. For example, the court of appeals stated: "No voter Plaintiff claims that in this election he was prevented from registering to vote, prevented from voting or

prevented from voting for the candidate of his choice. Nor does any voter claim that his vote was rejected or not counted." *Id.* at *9. In short, Petitioners simply failed to prove the existence of *any* injury affecting their rights to vote. The court of appeals was thus manifestly correct in holding that the type of injury which might otherwise demand the extraordinary relief of a preliminary injunction was absent in this case. *Id.*

Not only did Petitioners fail to establish on the record the substantial likelihood of irreparable harm, but they also did not even allege any concrete and immediate legally cognizable injury. As the court of appeals properly concluded, "we reject the contention that merely counting ballots gives rise to cognizable injury." *Id.* at *10. Petitioners had their votes counted and the fact that the Florida electoral process provides a means whereby the ballots of other voters may also be counted (as opposed to being ignored, which Petitioners have persistently asked the courts to do) cannot produce any injury to them. A preference by Petitioners for machine ballot counting over manual counts likewise does not rise to the level of a recognizable constitutional or other injury. See *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-83 (1982).

Petitioners' attempt to create irreparable harm by equating the manual recount process with state action that "chills" the exercise of First Amendment rights has no merit. In the first place, Petitioners clearly has no viable "vote dilution" claim arising from application of the Florida recount statute. No vote can be "diluted" in the constitutional sense – and consequently no voter can be injured – by a procedure that simply seeks to count the legally cast votes of those whose votes may not have been recognized by an initial machine count. A recount does not result in "dilution." See *Bennett* v. *Yoshina*, 140 F.3d 1218,

1226 (CA9 1998); *Partido Nuevo Progresista* v. *Perez*, 639 F.2d 825, 828 (CA1 1980).[2]

The court of appeals decision also does not conflict with the decision of this Court in *Moore* v. *Ogilvie*, 394 U.S. 814 (1969). The vote dilution in *Moore* proceeded from a state nominating petition statute that improperly granted greater voting strength to less populous counties than to more populous areas and thus obviously discriminated against one voting group in favor of another in violation of the Fourteenth Amendment Equal Protection Clause. Nothing of the sort exists here with respect to the Florida manual recount statute, which is applicable to all counties on a non-discriminatory basis, does not provide for any geographically imbalanced weighing of votes, and seeks only to ensure that a more complete and accurate vote count is obtained. The Florida statute clearly does not offend this Court's "one person – one vote" jurisprudence and thus cannot be said to

[2] Petitioners largely based their vote dilution arguments on what they alleged to be the "selective" nature of the Florida recount statute because only a few counties were involved in the process. The Florida statute, however, allows a manual recount in *any* county where it is properly requested. See Fla. Stat. § 102.166(4). Thus, any appearance of selectivity is only a product of the fact that Petitioners' chosen candidates elected *not* to seek recounts in other counties. In any event, the recent action by the Florida Supreme Court in *Gore* v. *Harris*, taken in connection with a different statute (the election contest provisions of Fla. Stat. § 102.168), has virtually eliminated the basis for Petitioners' argument by extending a manual recount of "undervotes" to *all* Florida counties where no previous request for a recount had been made.

produce any injury to Petitioners, irreparable or otherwise.[3]

Similarly, the court of appeals' opinion is not at odds with *Department of Commerce* v. *U.S. House of Representatives*, 525 U.S. 316 (1999), which involved a challenge to census sampling techniques. Indeed, the Court in *Department of Commerce* never reached the constitutional issues, so the question of irreparable injury did not arise in that context. Indeed, *Department of Commerce* undermines Petitioners' argument. There, and in *Wisconsin* v. *New York*, 517 U.S. 1 (1996), this Court rejected any suggestion that the Constitution was offended by manual counts and recounts of the census, even though evidence showed that such methods were certain to produce inaccuracies.

Furthermore, there has in fact been no "chilling" of Petitioners' First Amendment rights by reason of the Florida recount statute. As the court of appeals correctly noted, there are no claims here that Petitioners were prevented from voting or registering to vote or that their votes were rejected or not counted. 2000 WL 1781946, at *9. There is likewise no allegation or evidence that Petitioners were restricted in any way by the Florida statute from expressing support for the candidate of their choice or from their right to associate with others of like political persuasion. Petitioners have failed to establish that

[3] Petitioners reliance on *Baker* v. *Carr*, 369 U.S. 385 (1961), *Wesbury* v. *Sanders*, 376 U.S.1 (1964), and *Gray* v. *Sanders*, 372 U.S. 368 (1968) is equally misplaced. In all of the statutes in question in those cases, representatives to the same statewide body were elected from political jurisdictions with widely disparate populations. That issue is not presented here in the case of an at-large election where, although the elections are conducted by individual counties, the winner is determined based on the statewide popular vote.

there is even an incidental impact on any First Amendment right they have which is associated with the voting process. Petitioners' effort to create harm where none exists is wholly unpersuasive.

Petitioners' claim of injury arising from the effects of election contest proceedings conducted under Fla. Stat. § 102.168 is misplaced. Petitioners' constitutional challenges are addressed to the manual recount statute – Fla. Stat. § 102.166 – and those recounts have now been concluded. No issue concerning Section 102.168 – constitutional or otherwise – was raised before the court of appeals and no such issue is properly presented to this Court by the petition. As the court of appeals so aptly observed, a recount ordered by a state court in a contest proceeding would present a far different case with different legal issues. 2000 WL 1781946 n.10. Thus, if Petitioners wish to contend that they are being constitutionally harmed by the election contest statute or by the interaction of that statute and proceedings thereunder with the manual recount statute, then they must properly present such claims to the district court by way of an amended or supplemental complaint. The fact that the Florida Supreme Court has now addressed and resolved issues in the election contest proceeding adds no element of irreparable injury to this case even if these issues were properly before the Court.

B. There Is No Conflict With Other Circuit Court Decisions.

The court of appeals also properly recognized that not every alleged constitutional violation presumptively produces irreparable injury and that controlling jurisprudence follows a more narrow focus in applying this principle. Specifically, the court of appeals recognized that the presumption of irreparable injury did not extend to alleged violations of the Fourteenth

Amendment, but was instead limited to right of privacy claims and certain First Amendment claims involving an imminent danger that free speech would be directly chilled or prevented. 2000 WL 1781946, at *10. The court of appeals correctly held that Petitioners' allegations did not make out such a case and thus did not create any presumption of irreparable injury. *Id.*

Contrary to Petitioners' assertions, the court of appeals' decision in this regard does not conflict with the decisions of either the Ninth or Second Circuits cited in the petition, none of which involved voting rights issues. In *Goldie's Bookstore, Inc.* v. *Superior Court of California*, 739 F. 2d 466, 472 (CA9 1984), the Ninth Circuit actually *reversed* the grant of a preliminary injunction because the likelihood of success on plaintiffs' equal protection constitutional claim was "very slight" and because the balance of hardships (*i.e.*, irreparable harm) did not favor plaintiffs. This case thus undermines Petitioners' position. The language quoted by Petitioners is simply dicta unsupported by reference to any other Ninth Circuit authority.[4] If anything, the decision in *Goldie's* is entirely consistent with the result in the court of appeals because the Ninth Circuit expressly recognized that the existence of harm is directly related to the strength or weakness of the constitutional claim.[5] Here, Respondents

[4] The court in *Goldie's* recognized that the issue of whether an alleged constitutional violation could alone give rise to irreparable harm was not before it because the district court in fact did *not* rely on that proposition. The court went on to state, however, that it could not affirm on the basis of that concept anyway because the constitutional claim was "too tenuous." 739 F.2d at 472.

[5] *Monterey Mechanical Co.* v. *Wilson*, 125 F.3d 702 (CA 9 1997), also cited by Petitioners, is to the same effect and likewise does not conflict with the Eleventh Circuit's opinion. There, the court made it clear that any finding

submit that the factual record is woefully insufficient to support Petitioners' constitutional allegations, providing yet another basis upon which to conclude that Petitioners have shown no irreparable injury.

The Second Circuit decisions cited by Petitioners are similarly not in conflict with the Eleventh Circuit's holding. Both *Brewer* v. *West Irondequoit Central School District*, 212 F.3d 738 (CA2 2000), and *Jolly* v. *Coughlin*, 76 F.3d 468 (CA2 1996), discussed the issue of irreparable harm in the context of the plaintiff having clearly made the requisite showing of a substantial likelihood of success on the merits of the constitutional claims.[6] Thus, these Second Circuit decisions stand for the unremarkable proposition that in cases not involving the right to privacy or direct infringements on First Amendment rights, the presumption of harm will arise when the complaining party has made the requisite showing with respect to the merits of the constitutional claim. The Eleventh Circuit

of irreparable harm in the context of a constitutional challenge seeking injunctive relief would be dependent upon a proven constitutional infringement. In *Monterey*, the Ninth Circuit held the challenged statute unconstitutional on the basis of the factual record, and its comments about irreparable harm arising from constitutional infringement were only made in that context. Even then, the Ninth Circuit simply remanded the case to the district court to reconsider preliminary equitable relief in light of the determination of unconstitutionality. Nothing in *Monterey* suggests that irreparable harm in the Ninth Circuit will be presumed from an unproven constitutional violation.

[6] *Covino* v. *Patrissi*, 967 F.2d 73 (CA2 1992) (cited by *Brewer*), and *Statharos* v. *New York Taxi and Limousine Commission*, 198 F.3d 317 (CA2 1999), are both privacy cases and are clearly consonant with the Eleventh Circuit's conclusion regarding the presumption of irreparable harm in constitutional cases.

decision rests on the same principle. In the present case, the lack of record support effectively precludes Petitioners from establishing a substantial likelihood of success on the merits, and there is no occasion for the presumption to arise, just as would be the outcome under the Ninth and Second Circuit decisions relied upon by Petitioners.

C. Petitioners Have Not Demonstrated A Substantial Likelihood Of Success On The Merits Of Their Constitutional Claims.

The district court denied the preliminary injunction not only because Petitioners failed to demonstrate irreparable injury from the denial of an injunction, but also because they failed to demonstrate a substantial likelihood of success on the merits of their equal protection, due process and First Amendment claims. Although the court of appeals found it unnecessary to reach these claims, the district court was correct in so holding and certiorari should be denied on this independent ground as well.

1. Equal Protection. The district court correctly found that Petitioners have not met the burden of showing a likelihood of success on the merits of their equal protection claims. The availability of the manual recount as a standard post-election, precertification procedure is a long-standing feature of Florida law, and of the law of other States,[7] and has been repeatedly

[7] See Cal. Elec. Code § 15627; Colo. Rev. Stat. § 1-10.5-102(3); 10 Ill. Comp. Stat. § 5/24A-15.1; Ind. Code § 3-12-3-13; Iowa Code § 50.48(4); Kan. Stat. Ann. § 25-3107(b); Md. Code § 13-4; Mass. Gen. Laws ch. 54, § 135B; Minn. R. 8235.1000; Mont. Code Ann. § 13-16-414(3); Neb. Rev. Stat. § 32-1119(6); Nev. Rev. Stat. § 293.404(3); N.J. Stat. Ann. § 19:53A-14; 25 Pa. Code § 30. At least 20 other states have enacted statutes allowing or even – as in Texas – encouraging the use of manual recounts to back up punch-card tabulation systems. S.D. Admin. R. 5:02:09:05(5); Tex. Elec.

used as part of Florida's system of electoral checks and balances to ensure that all lawfully cast ballots are counted. The district court correctly found that Florida process is available equally and provides candidates for office and political parties within each county with equal rights to seek a recount. "Florida's manual recount provision is a 'generally-applicable and evenhanded' electoral scheme." 2000 WL 1694376, at *6 (S.D. Fla., Antoon) (citing *Anderson* v. *Celebrezze*, 460 U.S. at 788 n.9). No requests for manual recounts have been denied in this election. As the court of appeals recognized, the precertification process pursuant to Fla. Stat. § 102.166 is based on the correct conclusion that Florida's designation of political candidates and parties to request manual recounts is a "reasonable choice" because "they are the ones most likely to be alert to problems with a machine tally." 2000 WL 1781946, at *16 (Anderson, J., concurring). The Chief Judge of the court of appeals went on to note that permitting political candidates to protect voter interests as part of the checks and balances of a state electoral structure is common among the states. *Id.* at *17 n.9. And, this Court has previously recognized that manual recount procedures, like those that are included in Florida law, are a completely ordinary mechanism for ensuring the accuracy of vote-counts in close elections. See *Roudebush* v. *Hartke*, 405 U.S. 15, 25 (1972) ("A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, §4.").

Petitioners argue that the Florida statute should be invalidated because it "allows a candidate in a statewide election to selectively cause the votes in some counties to be counted,

Code § 212.005(d); Vt. Stat. § 2601; Va. Code Ann. § 24.2-802(C); W. Va. Code § 3-4A-28(4); Wis. Stat. § 5.90.

while ignoring valid votes in other counties." *Touchston* Pet. at 19. This argument demonstrates a clear lack of understanding of the Florida process. Fla. Stat. § 102.166 allows any candidate or political party to request a manual recount in any county.[8] More importantly, in the context of a contest under Fla. Stat. § 102.168, the Florida Supreme Court has ordered that validly cast ballots for which machines did not record a vote be examined in order to determine if there is a clear indication of the intent of the voters casting such ballots. Slip op. at 40.

The basis of Florida's manual recount statute is reasonable. The use of different vote tabulating systems undoubtedly will generate tabulation differences from county to county. But this

[8] Petitioners conveniently lose sight of the fact that a candidate or party can only request, not mandate, a manual recount. Fla. Stat. § 102.166(4). Moreover, as Chief Judge Anderson explained, the statutory procedures governing manual recounts provide safeguards against the type of partisan abuses suggested by Petitioners:

> [T]he decision [to grant a manual recount] is made by a county canvassing board composed of three statutorily designated officials, including a county court judge, none of whom are active participants in the candidacy of any candidate. *See* Fla. Stat. § 102.141. The canvassing board's discretion is not standardless, but rather is guided by a statutory purpose of determining the intention of voters and correcting "an error in the vote tabulation which could affect the outcome of the election." *Id.* § 102.166(5). Florida law further provides that canvassing board meetings must be open to the public. *See id.* § 286.0105(1). Finally, a canvassing board's decision to grant or deny a manual recount is subject to judicial review. * * * The combination of the composition of the canvassing boards, the statutory standards guiding their discretion, and the availability of judicial review provides meaningful checks on the exercise of discretion by canvassing boards, and reduces the risk of partisan influences tainting the process.
>
> Slip op. at 40-41.

will be true "[u]nless and until each electoral county in the United States uses the exact same automatic tabulation (and even then there may be system malfunctions * * * .)." *Siegel*, 2000 WL 1687185, at *7. "No court has held that the mere use of different methods of counting ballots constitutes an equal protection violation." 2000 WL 1781946, at *14 (concurring opinion). Indeed, the fact that counties have different ballot marking and counting systems demonstrates the value in having statutory checks and balances such as a manual recount process.[9]

[9] For example, most counties in Florida utilize an optical scanning vote count system. That system performed with great accuracy during the presidential race, resulting in only a 0.4% undervote rate (4 in 1000 ballots). (See Decl. of Jon Ausman, App. of Appellee-Intervenor Florida Democratic Party in *Siegel*, No. 00-15981-C (CA11), Tab 13, ¶ 8.) In contrast, punch card systems such as those used in Palm Beach, Broward and Miami-Dade counties experienced a 3.2% undervote rate (32 in 1000 ballots) in the presidential race. (Decl. of Jon Ausman, App. Tab 13, ¶ 9.) The manual recount process can ameliorate some of the disparity created by the use of different marking and counting equipment. Such a system not only does not violate the Equal Protection Clause, but it also enhances the equality of the voting process. Petitioners' equal protection claims are tantamount to contending that unless each county's marking and counting systems are identical in every way there is violation of constitutional rights. Even if Petitioners had standing to allege a denial of equal protection in the failure to conduct a recount in the counties in which it was not requested, their equal protection claim would be unsupportable in light of the entirely reasonable basis for the distinction in treatment between the ballots of the various counties. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983) (with respect to regulation of elections, "State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions"); see also Slip op. at 42 ("[T]he state has sufficiently strong interests to justify the manual recounting of votes within the established statutory framework.") (Anderson, J., concurring). The basis for determining where recounts are conducted was not arbitrary. Where there

2. <u>Due Process.</u> Petitioners due process arguments are meritless. As provided by the plain language of the statute, the manual recount provisions are designed to remedy errors in the vote tabulation "which could affect the outcome of the election and to arrive at the true voters' intent." Slip op. at 42. Petitioners' mantra that the Florida manual recount statute does not incorporate "any standard" and "gives absolute discretion" to county canvassing boards ignores the plain language of the statute. Citing *Broward County Canvassing Board* v. *Hogan*, 607 So. 2d 508 (Fla. App. 1992), Petitioners attack the Florida statutes by arguing that the discretion delegated by the Florida Legislature to the county canvassing boards in Fla. Stat. § 102.144(4)(c) violates the Due Process Clause. *Touchston* Pet. at 21. Specifically, Petitioners anticipate a harm, contending that canvassing boards will discriminate against candidates based on political affiliations. But, no evidence of such behavior exists in this case, nor is there any evidence of such behavior ever occurring. Indeed, in this case, there has not been any request for a manual recount that was not granted by a county canvassing board. Moreover, in *Palm Beach County Canvassing Board* v. *Harris*, No. 00-836, the Florida Supreme Court inquired of counsel for Governor Bush (the candidate supported by Petitioners) whether he wanted to request manual recount in any additional counties. Governor Bush declined the offer. (Florida Supreme Court Order, Nov. 21, 2000, *Palm Beach* v. *Harris*, at n.56). *Touchston* Pet. at 21. Fla. Stat. § 102.166 provides that a full manual recount should only go forward if the canvassing board determines that, after a sample

was a request for a manual recount, it was granted. Where there was no request, it was not. Nothing could be more reasonable, or less discriminatory.

manual evaluation of ballots, the results of the manual recount "could affect the outcome of the election."

Petitioners also argue that there are no standards covering the canvassing boards' examination of ballots subject to a manual recount. *Touchston* Pet. at 21. Again, a simple reading of the statute belies Petitioners' claim. Fla. Stat. § 102.166(7) sets forth the procedure for manual examination of a ballot and requires that the ballots be examined to ascertain the "intent of the voter." This clear standard is consistent with that which was emphasized by the Florida Supreme Court in *Gore* v. *Harris* in the context of the remedy ordered in the contest proceeding conducted pursuant to Fla. Stat. § 102.168: "In tabulating the ballots and in making a determination of what is a 'legal' vote, the standard to be employed is that established by the Legislature in our [Florida's] Election Code is that the vote shall be counted as a 'legal' vote if there is a 'clear indication of the intent of the voter.'" Slip op. at 40 (citing Fla. Stat. § 101.5614(5)).

Contrary to Petitioners' assertion, *City of Chicago* v. *Morales*, 527 U.S. 41 (1999), is inapplicable here. *Touchston* Pet. at 21. In *Morales*, this Court affirmed the state court's decision that struck down an anti-gang criminal ordinance as vague because it did not articulate a standard for illegal loitering. The ordinance provided inadequate notice regarding whether behavior would be illegal and thus created the risk of criminal conviction without any criminal standard. Here, the Florida Legislature established a clear voter-intent standard delegating authority to local election officials to apply the standard to the facts presented to the local officials, such as the type of vote marking equipment used in their county. Petitioners have not been harmed in remotely the same way that the plaintiffs in *Morales* were. They make no claim that their primary conduct

was subject to the whim of an official. Nor do they claim that their votes were not counted because of a vague voter-intent standard.

Petitioners' reliance on *United States* v. *Mosely*, 238 U.S. 383 (1915), *United States* v. *Classic*, 313 U.S. 299 (1941), and *Lane* v. *Wilson*, 307 U.S. 268 (1939), in support of their due process claims miss the mark. All three cases examine facts in which voters are deliberately and insidiously disenfranchised. *Mosely* and *Classic* were criminal cases that involved conspiracies to preclude votes in certain precincts from being counted and to count votes for a candidate as votes for his opponent. *Lane* is a challenge to a state statutory scheme that permanently disenfranchised a class of voters who failed to register to vote during a certain ten-day period. Unlike the cases cited by Petitioners, the Florida statutory process seeks to enfranchise voters where machine marking and recording equipment may have worked a disenfranchisement of voters who cast legal ballots.

Petitioners' reliance on *Bennett* v. *Yoshina*, 140 F.3d 1218 (CA9 1998), is ironic. *Bennett* clearly stands for the proposition that when voters relied on an election procedure and were disenfranchised for doing so, the procedure violates due process. There is no evidence in this case that voters relied on any standard for counting ballots other than the voter-intent standard contained in the state statutes. Moreover, the statutes do not disenfranchise any voters, but rather, offer a comprehensive system of checks and balances all designed to facilitate enfranchisement. Notwithstanding any alleged surprise voters might have when learning of the manner in which election officials discern voter intent, the system would still withstand constitutional scrutiny because counting more votes than had previously been counted does not disenfranchise anyone. See

Partido Nuevo Progresista v. *Perez*, 639 F.2d 825 (CA1 1980).

D. The Balance of Harm Does Not Favor Petitioners.

Petitioners' argument that the balance of harm "weighs heavily" in their favor is based entirely on the proposition that, if an injunction is not issued, their votes will somehow be diluted through the manual recount of a candidate-selected set of undervotes in four heavily populated, predominately Democratic counties while the undervotes in sixty-three counties will be completely uncounted, "resulting in a denial of equal protection." *Touchston* Pet. at 25. This argument has now been completely negated by the December 8, 2000 decision of the Florida Supreme Court in which, among other things, the manual recount of undervotes has now been extended to *all* Florida counties in which such recounts have not yet taken place. Thus, the very basis upon which Petitioners were attacking the recount statute – candidate-selected sets of undervotes – should no longer be considered an issue in this case. Not only does the balance of harm not favor Petitioners, but they cannot claim to be suffering any harm at all given the action by the Florida Supreme Court. On the other hand, even by Petitioners' own admission, an injunction at this point would visit substantial harm upon the state and county election and judicial officials who are now charged with the responsibility of ensuring that all undervotes throughout the state are accurately counted. It would also visit substantial harm upon Vice-President Gore and the Florida voters who selected him, as well as upon the public interest as the contest proceedings move towards a speedy resolution.

E. Petitioners' Public Interest Argument Is Baseless.

Petitioners' contention that the public interest would be served by the extraordinary injunctive relief they seek is based on two wholly unsupported claims. First, Petitioners claim the public interest is harmed because candidates may selectively pick the counties in which manual recounts will be conducted. Of course, *Gore* v. *Harris*, which requires that all undervotes be manually counted, regardless of the county, demolishes this argument. And, even if the Florida Supreme Court had not ordered such a remedy under Fla. Stat. § 102.168, the protest provisions of Fla. Stat. § 102.166 are generally and equally applicable – as has been fully discussed above. Second, without even a scintilla of evidence, Petitioners boldly argue that Florida's manual recount process results in an "erosion of the public trust in our electoral system." *Touchston* Pet. at 28. Indeed, Petitioners even go so far as to suggest that Florida's long-standing manual recount process creates "[a]n appearance of corruption." *Id.* at 28. There is absolutely no evidence of corruption, or even the appearance of corruption, in this case. Indeed, the very opposite is true. Florida's manual recount process acts as an important check on the ballot counting process that *promotes*, not erodes, public trust in the electoral system. Manual recounts occur when a candidate or political party states a valid reason for a recount and in the judgment of local officials the results of a manual recount could affect the outcome of an election. The manual recounts that were conducted pursuant to Fla. Stat. § 102.106 were conducted in full public view by counting teams made up of representatives from different political parties with the supervision of a three-member canvassing board that include a sitting county judge and review by the Florida judiciary.

CONCLUSION

The underlying action has been rendered irrelevant by the Florida Supreme Court's decision in *Gore v. Harris.* No reason would support what amounts to a collateral attack on that decision in the context of this petition. The court of appeals followed settled principles of law in affirming the district court's denial of a preliminary injunction. Petitioners have demonstrated no abuse of discretion in that decision. The petition therefore should be denied.

Respectfully submitted.

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December 9, 2000

December 8, 2000
Brief in opposition for respondent State of Florida, Petition in Touchston v. McDermott

No. _____

In the Supreme Court of the United States

Robert C. Touchston, Deborah Shepperd, and
Diana L. Touchston,

Petitioners,

v.

Michael McDermott, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT STATE OF FLORIDA

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QUESTION PRESENTED
(Restated)

1. Whether change in the margin of votes that a candidate wins an election by does not create irreparable harm?

2. Whether Manual Recount provisions of the election protest statute need not be enjoined from enforcement due to allegations that they are unconstitutional due to vote dilution?

3. Whether Manual Recount provisions of the election protest statute need not be enjoined from enforcement due to allegations that they lack sufficient standards to be consitutionally applied?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

Robert C. Touchston, Deborah Shepperd, Diana L. Touchston; Plaintiffs-Appellants; George W. Bush, Intervenor-Appellee; Michael McDermott, Ann McFall, Pat Northy, Theresa LePore, Charles E. Burton, Carol Roberts Jane Carroll, Suzanne Gunsburger, Robert Lee, David Lehy, Lawrence King, Jr. and Miriam Lehr, in their official capacities as members of the County Canvassing Boards of Volusia, Palm Beach, Broward and Miami-Dade Counties, respectively; Katherine Harris, in her official capacities as Secretary of the Department of State and as a member of the Elections Canvassing Commission; Clay Roberts and Bob Crawford, in their official capacity as members of the Elections Canvassing Commission, Defendants-Appellees; The Florida Democratic Party; Intervenor-Appellee; and Attorney General Robert A. Butterworth, Intervenor-Appellee (motion to intervene granted December 1, 2000).

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STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. s. 1254. The decision under review from the United States Court of Appeals for the Eleventh Circuit is an order rendered before rendition of judgment which was published on December 6, 2000.

STATEMENT OF THE CASE

Respondent State of Florida became a party to these proceedings on December 1, 2000, when the Eleventh Circuit Court of Appeals granted a motion to intervene filed by the State of Florida ex rel Attorney General Robert A. Butterworth on December 1, 2000.

Respondent Butterworth adopts the statement of the case and facts contained in the Eleventh Circuit's opinion in *Siegel v. Lepore*, Case No. 00-15981, Slip Op. at pp. 2-10 (11th Cir. Dec. 6, 2000), the reasoning of which was adopted in *Touchston v. McDermott*, Case No. 00-15985, Slip Op. at pp. 2 (11th Cir. Dec. 6, 2000).at Florida Supreme Court's opinion. Slip Op. pp. 2-8.

SUMMARY OF THE ARGUMENT

Voters supporting the candidacy of Governor Bush and Secretary Cheney have not been irreparably harmed because the margin by which they were declared winners of the election allegedly may have been distorted due to recounts undertaken pursuant to the statute being attacked.

Additionally, the attack on the manual recount provision of the protest statute has been rendered moot by the fact that the election process has moved beyond the protest stage and recounts are currently being conducted pursuant to the contest sections of the Florida election code. The equal protection

challenge has also been mooted by the fact that undervotes have been ordered to be recounted in all Florida counties.

REASONS FOR AFFIRMING THE DECISION BELOW

The manual recounts resulting through the application of § 102.166 (4) have been completed or terminated and the winners of the election certified. Although recounts are continuing, they have not been ordered pursuant to the statute concerned herein, but under the contest provision of the Florida Election Code. Therefore, the Petitioners are requesting this court to grant Certiorari in a case of purely academic interest because it could change the margin by which the electors for Governor Bush and Secretary Cheney were certified.

No irreparable harm results to voters simply because ballots of other voters were counted which did not change the outcome of the election.

Additionally, Petitioner's equal protection argument, based on allegations that recounts should take place statewide, is moot, where precisely that is taking place, albeit in accord with another portion of the statute.

I. THERE IS NO IRREPARABLE HARM.

The position of the Petitioners is that any voter should be able to turn the federal courts, including the United States Supreme Court, into tribunals for responding to questions of purely academic interest by filing a Petition for injunction alleging that one or more votes were recounted which shouldn't have been.

Here, the election process in Florida has moved far beyond any application of the manual recount provisions of the election protest statute. At the end of the protest period, Governor Bush and Secretary Cheney were certified as having prevailed in the Florida election, as of that time. Any subsequent activity which has any potential effect was the result of statutes other than the one under attack for alleged unconstitutionality in this case.

Petitioners' position, that alleging violation of constitutional rights is, by itself, sufficient to establish irreparable harm and create a basis for an injunction is in violation with the law, relied upon by the Eleventh Circuit, that the burden is on the movant to establish each of the elements of a temporary injunction before the trial court. Here, the Petitioners failed to establish any of them, but especially irreparable harm.

II. THIS MATTER IS MOOT WHERE THERE ARE NO LONGER ANY RELEVANT ACTIONS TAKING PLACE UNDER THE STATUTE CONCERNED AND A STATEWIDE RECOUNT IS TAKING PLACE.

The Florida Supreme Court has ordered a statewide recount pursuant to the contest provisions of § 102.168, Florida Statutes (2000), which is taking place right now. Thus, whether or not

the provisions of the protest statute, § 102.166, Florida Statutes (2000), which permit manual recounts to take place are unconstitutional or not (which is hotly contested), the matter is moot. All the recounts which took place under the statute under attack have either been completed or terminated, and the results of the election certified. The candidates that the Petitioners contend they supported have, thus far, prevailed. Should they be determined not to have prevailed in the future, it will not be because of the statutes concerned herein, but because of other provisions of the election code.

Further, with regard to the equal protection issue, the Florida Supreme Court has now ordered a statewide recount of all "no votes". Thus, to the extent that Petitioners complaint that some counties have been treated differently than others, that problem has been substantially, or even completely ameliorated.

This Court should not grant certiorari of a matter which is moot.

This case remains moot, even in the face of claims it is capable of repetition yet evading review. The underlying circumstances facing this Court are unique, and Petitioners have not presented any record basis for arguing that future courts could be faced with similar situations that would escape judicial review because the inevitable flow of events. The lower courts acted with admirable speed in reviewing the record and arguments the parties have presented, and the Petitioners' case is still moot because of other rulings and election proceedings besides the present action. The Petitioners can forward only a highly speculative basis for having this Court review a case that is moot, and such hypothetical arguments are insufficient to support judicial intervention. See, City of Los Angeles v. Lyons, 461 U.S. 95, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983) (conjectural injuries do not provide a basis for standing to seek injunctive relief). Even engaging in such speculation, it is

extremely unlikely that this same set of circumstances – involving the same parties – will face this Court in the future.

CONCLUSION

The opinion of the United States Eleventh Circuit Court of Appeal properly rests on the grounds that the Petitioners failed to establish irreparable harm. Through the protest period, the candidates they supported prevailed. Therefore, the Petitioners are requesting the United States Supreme Court to answer questions of purely academic interest. Further, the matter is moot where the election process has moved far beyond the protest stage and the statute under attack herein is not the basis for the current situation.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail and facsimile to James Bopp, Jr., Heidi K. Meyer, James R. Mason, III, Eric C. Bohnet, Justin David Bristol, Richard E. Coleson, and J. Aaron Kirkpatrick, 1 South 6th Street, Terre Haute, Indiana 47807; Matt Staver, Esq., 210 East Palmetto Avenue, Longwood, Florida 32750, and facsimile (407-875-0770), Laurence H. Tribe, Hauser Hall, Room 420, 1575 Massachusetts Avenue, Cambridge, MA 02138, Kendall Coffey, 2665 South Bayshore Drive, Miami, Florida 33133, Teresa Wynn Roseborough, 999 Peachtree Street, N.E., Atlanta, Georgia 30309-3996, and facsimile (404-853-8806); Bruce Rogow, Esq., Beverly A. Pohl, Esq., Broward Financial Centre, Suite 1930, 500 East Broward Blvd., Fort Lauderdale, Florida 33394, and facsimile (954-764-1530); Robert Ginsberg, Esq., County Attorney, Lee Kraftchick, Javier Soto, Office of Miami-Dade County Attorney, Metro Dade Center, 111 NW 1st Street, Suite 2810, Miami, Florida 33128 and facsimile (305-375-5634); Edward A. Dion, Michael Cirullo, Tamara Scrudders, Broward County Attorney, 115 S. Andrews Avenue, Fort Lauderdale, Florida 33301 and facsimile (954-357-7641); Denise Dytrych, Palm Beach County Attorney, P.O. Box 1989, West Palm Beach, Florida, 33402-1989, and facsimile (561-355-4398); Samuel S. Goren, Michael D. Cirullo, Jr., 3099 East Commercial Blvd, Suite 200, Fort Lauderdale, Florida 33308 and facsimile (954-771-4923); and J. B. Murray, 1900 Phillips Point West, 777 S. Flagler Drive, West Palm Beach, Florida 33401-6198, and facsimile (561-655-1509),

Daniel D. Eckert, Volusia County Attorney, 123 West Indiana Avenue, Deland, Florida 32720-4613 and facsimile (904-736-5990) this 9th day of December, 2000.

CHARLES M. FAHLBUSCH
Assistant Attorney General

December 9, 2000
United States Supreme Court Stay of Florida Vote Recount

SUPREME COURT OF THE UNITED STATES

No. 00-949 (00A504)

GEORGE W. BUSH ET AL. *v.* ALBERT GORE, JR. ET AL.

ON APPLICATION FOR STAY

[December 9, 2000]

The application for stay presented to JUSTICE KENNEDY and by him referred to the Court is granted, and it is ordered that the mandate of the Florida Supreme Court, case No. SC00-2431, is hereby stayed pending further order of the Court. In addition, the application for stay is treated as a petition for a writ of certiorari, and the petition for a writ of certiorari is granted. The briefs of the parties, not to exceed 50 pages, are to be filed with the Clerk and served upon opposing counsel on or before 4 p.m. Sunday, December 10, 2000. Rule 29.2 is suspended in this case. Briefs may be filed in compliance with Rule 33.2 to be replaced as soon as possible with briefs prepared in compliance with Rule 33.1. The case is set for oral argument on Monday, December 11, 2000, at 11 a.m., and a total of 1½ hours is allotted for oral argument.

JUSTICE SCALIA, concurring.

Though it is not customary for the Court to issue an opinion in connection with its grant of a stay, I believe a brief response is necessary to JUSTICE STEVENS' dissent. I will not address the merits of the case, since they will shortly be before us in the petition for certiorari that we have granted. It suffices to say that the issuance of the stay suggests that a majority of the Court, while not deciding the issues presented, believe that the petitioner has a substantial probability of success.

On the question of irreparable harm, however, a few

words are appropriate. The issue is not, as the dissent puts it, whether "[c]ounting every legally cast vote ca[n] constitute irreparable harm." One of the principal issues in the appeal we have accepted is precisely whether the votes that have been ordered to be counted are, under a reasonable interpretation of Florida law, "legally cast vote[s]." The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election. Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires. Another issue in the case, moreover, is the propriety, indeed the constitutionality, of letting the standard for determination of voters' intent— dimpled chads, hanging chads, etc.— vary from county to county, as the Florida Supreme Court opinion, as interpreted by the Circuit Court, permits. If petitioner is correct that counting in this fashion is unlawful, permitting the count to proceed on that erroneous basis will prevent an accurate recount from being conducted on a proper basis later, since it is generally agreed that each manual recount produces a degradation of the ballots, which renders a subsequent recount inaccurate.

For these reasons I have joined the Court's issuance of stay, with a highly accelerated timetable for resolving this case on the merits.

SUPREME COURT OF THE UNITED STATES

No. 00-949 (00A504)

GEORGE W. BUSH ET AL. *v.* ALBERT GORE, JR. ET AL.

ON APPLICATION FOR STAY

[December 9, 2000]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

To stop the counting of legal votes, the majority today departs from three venerable rules of judicial restraint that have guided the Court throughout its history. On questions of state law, we have consistently respected the opinions of the highest courts of the States. On questions whose resolution is committed at least in large measure to another branch of the Federal Government, we have construed our own jurisdiction narrowly and exercised it cautiously. On federal constitutional questions that were not fairly presented to the court whose judgment is being reviewed, we have prudently declined to express an opinion. The majority has acted unwisely.

Time does not permit a full discussion of the merits. It is clear, however, that a stay should not be granted unless an applicant makes a substantial showing of a likelihood of irreparable harm. In this case, applicants have failed to carry that heavy burden. Counting every legally cast vote cannot constitute irreparable harm. On the other hand, there is a danger that a stay may cause irreparable harm to the respondents– and, more importantly, the public at large– because of the risk that "the entry of the stay would be tantamount to a decision on the merits in favor of the applicants." *National Socialist Party of America* v. *Skokie,* 434 U. S. 1327, 1328 (1977) (STEVENS, J., in

chambers). Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election.

It is certainly not clear that the Florida decision violated federal law. The Florida Code provides elaborate procedures for ensuring that every eligible voter has a full and fair opportunity to cast a ballot and that every ballot so cast is counted. See, *e.g.*, Fla. Stat. §§ 101.5614(5), 102.166 (2000). In fact, the statutory provision relating to damaged and defective ballots states that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Fla. Stat. § 101.5614(5) (2000). In its opinion, the Florida Supreme Court gave weight to that legislative command. Its ruling was consistent with earlier Florida cases that have repeatedly described the interest in correctly ascertaining the will of the voters as paramount. See *State ex rel. Chappell* v. *Martinez*, 536 So. 2d 1007 (1998); *Boardman* v. *Esteva*, 323 So. 2d 259 (1976); *McAlpin v. State ex rel. Avriett*, 19 So. 2d 420 (1944); *State ex rel. Peacock* v. *Latham*, 169 So. 597, 598 (1936); *State ex rel. Carpenter* v. *Barber*, 198 So. 49 (1940). Its ruling also appears to be consistent with the prevailing view in other States. See, *e.g.*, *Pullen* v. *Milligan*, __ Ill.2d __, 561 N. E. 2d 585, 611 (Ill. 1990). As a more fundamental matter, the Florida court's ruling reflects the basic principle, inherent in our Constitution and our democracy, that every legal vote should be counted. See *Reynolds* v. *Sims*, 377 U. S. 533, 544–555 (1964); cf. *Hartke* v. *Roudebush*, 321 F. Supp. 1370, 1378–1379. (SD Ind. 1970) (STEVENS, J., dissenting); accord *Roudebush* v. *Hartke*, 405 U. S. 15 (1972).

Accordingly, I respectfully dissent.

December 10, 2000
Brief of George W. Bush on Application for Stay to the United States Supreme Court

No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Petitioners,

v.

ALBERT GORE, JR., *et al.*,
Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

2. Whether the Florida Supreme Court erred in establishing post-election, judicially created standards that threaten to overturn the certified results of the election for President in the State of Florida and that fail to comply with the requirements of 3 U.S.C. §5, which gives conclusive effect to state court determinations only if those determinations are made "pursuant to" "laws enacted prior to" election day.

3. Whether the use of arbitrary, standardless and selective manual recounts to determine the results of a presidential election, including post-election, judicially created selective and capricious recount procedures that vary both across counties and within counties in the State of Florida, violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceeding in the court below:

Governor George W. Bush, as Nominee of the Republican Party of the United States for President of the United States; Richard Cheney, as Nominee of the Republican Party of the United States for Vice President of the United States; Albert Gore, Jr., as Nominee of the Democratic Party of the United States for President of the United States; Joseph I. Lieberman, as Nominee of the Democratic Party of the United States for Vice President of the United States; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, individually and as members of the Florida Elections Canvassing Commission; the Miami-Dade County Canvassing Board; Lawrence D. King, Myriam Lehr and David C. Leahy as members of the Miami-Dade Canvassing Board; David Leahy individually and as Supervisor of Elections; the Nassau County Canvassing Board; Robert E. Williams, Shirley N. King and David Howard (or, in the alternative Marianne P. Marshall), as members of the Nassau County Canvassing Board; Shirley N. King individually and as Supervisor of Elections; the Palm Beach County Canvassing Board; Theresa LePore, Charles E. Burton and Carol Roberts, as members of the Palm Beach Canvassing Board; Theresa LePore individually and as Supervisor of Elections; and Stephen Cruce, Teresa Cruce, Terry Kelly, Jeanette K. Seymour, Matt Butler, John E. Thrasher, Glenda Carr, Lonnette Harrell, Terry Richardson, Gary H. Shuler, Keith Temple, and Mark A. Thomas, as Intervenors.

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BRIEF FOR PETITIONERS

On December 4, 2000, this Court unanimously vacated the Florida Supreme Court's November 21 judicial revision of Florida's election laws. *Bush v. Palm Beach County Canvassing Board*, No. 00-836 (U.S. Dec. 4, 2000). The Court remanded for further proceedings not inconsistent with its concerns regarding the Florida court's awareness of and compliance with federal constitutional and statutory constraints on the authority of the Florida judiciary to revise the Florida Legislature's method for appointing presidential electors. *Id.*

Just four days later, *without a single reference to this Court's December 4 decision*, the majority of the Florida Supreme Court announced sweeping and novel procedures for recounting selected Florida ballots to determine anew the winner of the November 7 presidential election in Florida. This latest manual recount regime would be conducted according to varying—and unspecified—standards, by officials unspecified in Florida's election law, and according to an ambiguous and apparently unknowable timetable. The Florida court's wholesale revision of Florida statutory law, adopted in part to address the problems flowing from its earlier abandonment of the system crafted by the Florida Legislature, ignores the obviously intertwined nature of the protest and contest provisions and overrides numerous legislative choices embodied in the Florida Election Code.

The decision below acknowledges, but fails to adhere to, Article II, § 1, cl. 2 of the federal Constitution, which vests plenary and exclusive authority in the Florida Legislature to determine the manner of selecting Florida's electors. And, while the Florida court stated that it was "cognizant" of 3 U.S.C. § 5, which creates a "safe harbor" allowing a State to afford conclusive effect to its choice of presidential electors, it completely rewrote the Florida Legislature's pre-election laws designed to take advantage of that provision. The court's

newly devised scheme for re-tabulating votes is plainly arbitrary, capricious, unequal, and standardless.

The court below not only failed to acknowledge that its earlier decision had been vacated, it openly relied on manual recounts that had occurred *only* because of that opinion as a predicate for changing the Secretary of State's certification of the election and as the foundation for its state-wide recount plan. It compounded that manifest overreaching by overriding its own "equitable" deadlines, created two weeks ago, as well as the legislature's carefully wrought timetable.

The Florida court's decision imposes its decree on counties that were never part of the proceedings below, overrides statutory authority explicitly vested in the state's chief election officer and local canvassing boards, designates new officials to supervise in place of the officials specified in Florida's election code to discharge that function, establishes a standard for the instigation of recounts not recognizable under Florida law, requires manual recounts of "under-voted" but not "over-voted" ballots, and mandates inconsistent recounts within certain counties, in violation of fundamental principles of equal protection and due process.

The unconstitutional flaws in the Florida Supreme Court's judgment immediately bore further unconstitutional fruit when the trial court attempted to implement the supreme court's decision, which effectively mandated the creation of an entirely new set of arbitrary and unreviewable *ad hoc* procedures that are flatly incompatible with the legislature's judgments regarding the conduct and timing of manual recounts and its delegation of authority to the Secretary of State to ensure uniformity in election procedures. *See* Petitioners' Supplemental Mem. In Support Of Emergency Application, No. 00A-504 (filed Dec. 9, 2000). The trial court explicitly acknowledged it was creating a two-tier system, one for Dade County and one for "the rest of the counties in the state." Hearing Tr. at 5 (attached to Petition-

ers' Supplemental Mem.). In the interest of making the recounts "go as smoothly as possible," the trial court precluded parties from objecting to the interpretation or allocation of individual ballots in the course of the recounts. *Id.* at 8. The trial court called for county canvassing boards throughout the state to create new "protocols" for the recounts. *Id.* And the trial court explicitly acknowledged that there were to be no specific, uniform standards to guide the recounts. *Id.* at 10.

This case is the quintessential illustration of what will inevitably occur in a close election where the rules for tabulating ballots and resolving controversies are thrown aside after the election and replaced with judicially created *ad hoc* and *post hoc* remedies without regard for uniformity, objectivity, or finality. The Florida Supreme Court has not only violated the Constitution and federal law, it has created a regime virtually guaranteed to incite controversy, suspicion, and lack of confidence not only in the process but in the result that such a process would produce.

OPINIONS BELOW

The opinion of the Supreme Court of Florida below (Pet. App. 1a-56a) is not yet reported. The order of the Circuit Court for the County of Leon, Florida (Pet. App. 57a) is not reported. The November 21, 2000 opinion of the Supreme Court of Florida in *Palm Beach County Canvassing Board v. Harris* (Pet. App. 66a-100a), is reported at __ So. 2d __, 2000 WL 1725434 (Fla. Nov. 21, 2000).

JURISDICTION

The judgment of the Supreme Court of Florida was entered on December 8, 2000. The jurisdiction of this Court rests upon 28 U.S.C. §1257(a). *See* Applic. for Stay, No. 00A504, at 16-19. Petitioners seek reversal of the Supreme Court of Florida's decision, which, as ex-

plained below, violates Article II of the United States Constitution, 3 U.S.C. §5, and the Fourteenth Amendment to the Constitution, and irreconcilably conflicts with this Court's decision in *Bush v. Palm Beach County Canvassing Board*, No. 00-836 (Dec. 4, 2000).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional and statutory provisions are set forth at Pet. App. 127a-145a.

STATEMENT OF THE CASE

According to the initial count and statutory recounts of the Florida election results, Governor Bush received more votes for President than did Vice President Gore. Nevertheless, more than a month after the November 7 presidential election, the outcome of that election remains shrouded in uncertainty, confusion, and intense controversy. The thirty-three days since the election have been characterized by widespread turmoil resulting from selective, arbitrary, changing, and standardless manual recounts of ballots in four Florida counties pursuant to requests made on behalf of Democratic presidential candidate Vice President Gore. The tide of litigation flowing from that fatally flawed process has resulted in decisions of the Florida Supreme Court that rewrite substantial portions of Florida's Election Code in a dramatic and unconstitutional departure from the scheme enacted by the legislature—a departure that threatens Florida's ability to obtain the finality and certainty that the Florida Legislature intended to achieve and that compliance with 3 U.S.C. § 5 provides.

A. Florida's Election Laws As Of November 7

Prior to November 7, 2000, pursuant to the authority conferred on it by Article II of the United States Constitution and 3 U.S.C. §5, the Florida Legislature had en-

acted a comprehensive and carefully interwoven statutory plan and set of procedures and timetables to govern the appointment of presidential electors, the conduct of elections, and the timely resolution of disputes and controversies related thereto.

Shortly after a presidential election, each Florida county's canvassing board is responsible for counting and certifying the election returns and forwarding them to the Florida Department of State. Fla. Stat. § 102.141. Florida's Secretary of State "is the chief election officer of the State" with responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. §97.012(1). "[A]s soon as the official results are compiled from all counties," the statewide Elections Canvassing Commission—comprising the Governor, the Secretary of State, and the Director of the Division of Elections—is required to "certify the returns of the election and determine and declare who has been elected for each office." Fla. Stat. § 102.111(1).

The legislative scheme contains two provisions mandating that local county canvassing boards must certify their election returns to the Department of State no later than 5:00 p.m. on the seventh day following the election. Fla. Stat. §§ 102.111, 102.112. Section 102.112 further provides that returns filed after that deadline "may" be ignored by the Secretary of State.

Florida law provides that, prior to the seven-day certification deadline, disputes over election results may be raised by submitting a "protest" to the county canvassing boards, *see* Fla. Stat. §102.166(1)-(2), and/or a request for a manual recount, *id.* § 102.166(4)-(10). The county canvassing boards have the discretion to reject or accept the request for a recount. *Id.* § 102.166(4)(c). If the canvassing board decides to perform a manual recount, it may first conduct a sample manual recount. *Id.* § 102.166(4)(d). If the sample manual recount indicates "an error in the vote tabulation which could affect the

outcome," the county canvassing board may correct the error and recount remaining precincts with the vote tabulation system, request verification of the tabulation software, or "[m]anually recount all ballots." *Id.* § 102.166(5).

If the canvassing board chooses to embark on a manual recount, the board "shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots," Fla. Stat. § 102.166(7)(a), and "[i]f the counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent," *id.* at (7)(b).

B. State Court Proceedings Leading To Extension Of The Certification Deadline

Although both the initial results of the November 7 election and a statewide machine recount of the ballots showed that Governor Bush and Secretary Cheney had received the most votes in the presidential election in Florida, a manual recount in four selected counties was requested on behalf of Vice President Gore and Senator Lieberman (the "Gore respondents"). On November 13, 2000, respondent Gore and others brought suit in state court, seeking to compel the Secretary of State to waive the November 14 deadline established by Florida statutes for certifying Florida's presidential election results. That suit sought to require the inclusion in certified totals of the results of manual recounts then contemplated or ongoing in Broward, Miami-Dade, and Palm Beach Counties. The circuit court denied that relief on November 17, concluding that the Secretary of State had exercised "reasoned judgment" in declining to accept late returns.

On November 21, the Florida Supreme Court reversed the circuit court and declared for the first time in Florida law that "the Secretary may reject a Board's amended returns only if the returns are submitted so late

that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." Pet. App. 97a. The Florida Supreme Court accordingly directed the Secretary of State to accept untimely manual recount returns through 5:00 p.m. on November 26, 2000—twelve days after the statutory deadline—and directed the Secretary to include in her certifications all manual recount returns received by that date. *Id.* at 99a.

Manual recounts thus occurred after November 14 to varying degrees in Broward, Palm Beach, and Miami-Dade counties, and results from Broward County's manual recount were submitted to the Secretary of State on November 25. Pet. App. 116a. On November 22, the Miami-Dade County Canvassing Board unanimously decided to halt its manual recount, after counting only 136 of the 635 precincts in the county. *Id.* at 59a. The Palm Beach Canvassing Board began a manual recount, but did not complete its work by the 5:00 p.m. November 26 deadline set by the Florida Supreme Court. The Board instead submitted partial returns at that time and later supplemented them. *Id.* at 60a.

As of 5:00 p.m. on November 26, the tabulated results showed *for the third time* that Governor Bush had received the most votes for President. Accordingly, the Secretary of State certified those returns and the Election Canvassing Commission declared Governor Bush the winner of Florida's presidential election.

C. This Court's Prior Decision

On November 22, Governor Bush filed a petition for certiorari seeking review in this Court of the Florida Supreme Court's November 21 decision. On December 4, 2000, this Court issued a unanimous *per curiam* opinion, vacating that decision and remanding the case "for further proceedings not inconsistent with this [Court's] opinion." *Bush*, slip op. at 6. This Court decided "to decline *at this time* to review the federal questions"

raised by petitioners because of uncertainty as to the grounds for the decision below. *Id.* (emphasis added). But this Court cautioned the court below against overriding the Florida Legislature's "wish" to secure for Floridians the benefits of the "safe harbor" accorded by 3 U.S.C. § 5, *see Bush*, slip op. at 6, and expressly directed the court below to explain "the extent to which [it] saw the Florida Constitution as circumscribing the legislature's authority under Art. II, §1, cl. 2" and "the consideration [it] accorded to 3 U.S.C. §5." *Id.* at 7. The Florida Supreme Court has not yet issued an opinion in that case on remand.

D. The Election Contest

Candidates and voters are permitted by Florida law to "contest" the certification of an election by filing a complaint in circuit court. *See* Fla. Stat. §§ 102.168, 102.1685. Such contests must be initiated within 10 days of the certification, *see* Fla. Stat. § 102.168(2), and involve judicial proceedings, including formal pleadings, discovery, and trial. Fla. Stat. § 102.168(3)-(8).

On November 27, 2000, the day after Governor Bush was certified as the winner of the November 7 presidential election in Florida, the Gore respondents filed a complaint in the Circuit Court for Leon County to contest that certification. Like the earlier protest actions, the complaint sought relief primarily with respect to a handful of heavily Democratic counties. The complaint alleged that the results certified by the Secretary of State improperly (1) failed to include a partial manual recount of ballots in Miami-Dade County; (2) failed to include untimely results of a manual recount in Palm Beach County; and (3) included the results from Nassau County's original machine count of ballots. The Gore respondents further asked the court to evaluate ballots in Palm Beach County and Miami-Dade County that the Gore respondents contended were not properly counted. In response, Governor Bush and Secretary Cheney ar-

gued *inter alia* that the relief sought by the Gore respondents would violate federal statutes and the United States Constitution. *See*, *e.g.*, Pet. App. 110a-117a, 120a-121a, 125a-126a.

On December 4, 2000, following a two-day trial, the circuit court rejected the Gore respondents' claims. The court found that there was no credible evidence establishing a reasonable probability that the Florida election results would be different if the requested relief were granted to the Gore respondents; that the Miami-Dade County Canvassing Board did not abuse its discretion in deciding not to perform a complete manual recount; and that the Palm Beach County Canvassing Board did not abuse its discretion in determining that the 3,300 ballots the Gore respondents sought to have reviewed again by the circuit court were non-votes. Pet. App. 61a-62a. The circuit court also found that the Palm Beach County "process and standards [for evaluating ballots] were changed from the prior 1990 standards," and noted that these changes were "perhaps contrary to Title III, Section (5) of the United States Code." *Id.* at 62a-63a.[1]

[1] That factual finding was supported by substantial evidence presented during the trial below. For example, Judge Burton, Chairman of the Palm Beach County Canvassing Board, admitted that when the first ballots were subject to a sample manual recount on November 11, the canvassing board used its existing 1990 guidelines mandating that if a "chad . . . is fully attached, bearing only an indentation, [it] should not be counted." Trial Transcript, *Gore v. Harris*, No. 00-2808, at 238, 239, 240 (Fla. Cir. Ct. Dec. 2-3, 2000) ("Trial Tr."). Judge Burton testified that during the sample recount, the canvassing board changed to the "Sunshine Rule," *id.* at 240 (defining "Sunshine Rule" as "any light that was coming through any indentation on a ballot"), and then back again to the 1990 standard. *Id.* at 242. According to Judge Burton, the Board eventually abandoned *any* semblance of a *per se* rule. *Id.* at 245. Ultimately, a court or-

The circuit court expressed its concern that implementing a different standard for evaluating ballots during the contest proceeding would create a two-tier system not only within certain counties, but also with respect to other counties. Citing an opinion letter from Florida's Attorney General, the circuit court explained that such a system "would have the effect of treating voters differently depending upon what county they voted in [thereby raising] legal jeopardy under both the United States and state constitutions." Pet. App. 63a (citation omitted).

The evidence before the trial court revealed that the lack of any specific guidance for determining whether a particular ballot reflected a vote, *see* Fla. Stat. § 101.5614(5), led to wide discrepancies across and within Florida counties regarding the evaluation of ballots in a manual recount. Indeed, standards often varied even from one canvassing board member to another in the same county.[2]

dered the canvassing board to consider "dimpled" chads even though the pre-existing 1990 policy precluded treating mere indentations as valid votes, *see Florida Democratic Party v. Palm Beach County Canvassing Bd.*, No. CL 00-11078-AB, 2000 WL 1728721 (Fla. Cir. Ct. Nov. 22, 2000), and even though a sample ballot provided in each voting booth instructed voters to: "check your ballot card to be sure your voting selections are clearly and cleanly punched and there are no chips left hanging on the back of the card." *Touchston v. McDermott*, No. 00-15985, 2000 WL 1781942, at *6 n.19 (11th Cir. Dec. 6, 2000) (Tjoflat, J., dissenting).

[2] For example, according to a monitor in Miami-Dade County, there were four different standards applied by three different canvassing board members. Judge King determined that every "dimpled or pregnant chad . . . was a vote," Trial Tr. 497, whereas Judge Lehr looked for any indication of chad separation. *Id.* at 497, 499. Supervisor Leahy switched from looking for a "two point" hanging chad during the sam-

The evidence before the trial court also revealed the substantial degradation of ballots caused by manual handling. Ballot fragility was most plainly evident in Miami-Dade, which attempted to undertake a selective recount during the judicially-extended protest period. Miami-Dade used machines in the first instance to segregate "no vote" ballots. Trial Tr. 479. That process demanded the constant stopping and starting of the ballot-counting machines, and frequent manual treatment of ballots was necessary to retrieve non-votes, clear jams, and process the ballots. *Id.* at 484, 485. The rough handling led to approximately *1,000 chads per day* being dislodged from ballots. *Id.* at 506.

E. The Florida Supreme Court's Decision

On December 8, 2000, a 4-3 majority of the Florida Supreme Court reversed the circuit court and announced the creation of a complex, non-uniform, and novel system for further manual recounts. The majority held that canvassing board decisions were not "to be accorded the highly deferential 'abuse of discretion' standard" after the protest period. Pet. App. 13a. Despite that ruling, and without review of the ballots, the majority directly *ordered* the inclusion of (1) 176 or 215 net votes for the Gore respondents as "identified" by the Palm Beach Canvassing Board,[3] and (2) 168 net votes for the Gore respondents "identified in the partial recount" by the Miami-Dade Canvassing Board but not submitted for certification. Pet. App. 3a-4a. All of these ballots were

ple recount, *id.* at 499, to the "Sunshine Rule" described above. *Id.* at 497. These standards also differed from the standards used in Palm Beach County.

[3] The court directed the trial court to determine whether 176 or 215 was the correct number. Pet. App. 4a n.6.

counted *after* the November 14 deadline.[4] Furthermore, the majority ordered the *trial court* "to immediately tabulate by hand the approximately 9,000 Miami-Dade ballots," *id.* at 33a, yet ordered the *supervisors of elections and canvassing boards* "in all counties that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith," *id.*[5]

The majority opinion did not acknowledge or respond to this Court's December 4 opinion vacating the November 21 decision, nor did it explain how its newly fashioned directives complied with 3 U.S.C. § 5's time limit. The majority conceded, however, that the "need for prompt resolution and finality is especially critical in presidential elections where there is an outside deadline established by federal law," Pet. App. 31a, and that "because the selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, *the Florida election law scheme must yield in the event of a con-*

[4] These votes were thus untimely under the statutory deadline, and were included only by virtue of the supreme court's improper reliance on its vacated November 21 opinion.

[5] The majority's decision thus has the effect of subjecting Miami-Dade County to an arbitrary double standard. The results from a *full* manual recount of all ballots from 20 percent of its precincts (the most heavily Democratic, in which Vice President Gore received about 75% of the vote) were ordered included in the totals, but the ballots from the remaining 80 percent of the county's precincts (many of which are more heavily Republican) would have only "undervotes" manually counted. Chief Justice Wells, in his dissent, expressed concern about this effect, because "not to count all of the ballots if any were to be recounted would plainly be changing the rules after the election and would be unfairly discriminatory against votes in the precincts in which there was no manual recount." Pet. App. 44a.

flict." *Id.* at 16a n.11 (emphasis added). The court nonetheless created and imposed a novel recount plan that could not be completed in a timely and orderly manner and that would, by definition, conflict with 3 U.S.C. § 5. *See* Pet. App. 32a n.21 ("we agree that practical difficulties may well end up controlling the outcome of the election"); *id.* at 56a (Harding, J., dissenting) (majority "provid[ed] a remedy which is impossible to achieve and which will ultimately lead to chaos").

Nor did the majority explain how its judgment could be reconciled with the constitutional and federal law claims raised by petitioners below. *See*, *e.g.*, Pet. App. 109a-110a (equal protection and due process); Pet. App. 110a (Article II and 3 U.S.C. § 5). As Chief Justice Wells wrote in dissent, Florida's "[c]ontinuation of [a] system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns" Pet. App. 43a-44a. He also concluded that directing the trial court to conduct a manual recount of the Miami-Dade County ballots violates Article II of the federal Constitution, in that "neither th[e Florida Supreme] Court nor the circuit court has the authority to create the standards by which it will count the undervoted ballots." *Id.* at 45a. Chief Justice Wells also expressed concern that "in a presidential election, the Legislature has not authorized the courts of Florida to order partial recounts, either in a limited number of counties or statewide," *id.* at 46a, and that "there is uncertainty as to whether the Florida Legislature has even given the courts of Florida any power to resolve contests or controversies in respect to presidential elections." *Id.* at 49a. In addition, Chief Justice Wells cautioned that "manual recounts by the canvassing board[s] are constitutionally suspect." *Id.* at 43a n.28.[6]

[6] Chief Justice Wells further noted that "[a] continuing problem with these manual recounts is their reliability. It only stands to reason that many times a reading of a ballot by

Although the majority announced that "every citizen's vote be counted whenever possible," Pet. App. 17a, and that it was the Florida Supreme Court's duty to "see that every citizen's vote be counted," *id.* at 17a n.12, the majority held that "a final decision as to the result of the statewide election should only be determined upon consideration of the legal votes contained within the undervote or 'no registered vote' ballots of all Florida counties, as well as the legal votes already tabulated." *Id.* at 18a. As Chief Justice Wells pointed out in his dissent, the majority ignored the fact that "overvotes" as well as "undervotes" result in a vote not being counted. *Id.* at 38a-39a n.26 (Wells, C.J., dissenting) ("It seems patently erroneous to me to assume that the vote-counting machines can err when reading undervotes but not err when reading over-votes.").[7]

The majority directed the trial court "to enter such orders as are necessary to add any legal votes to the statewide certifications," Pet. App. 33a, and instructed

a human will be subjective [and] [t]his subjective counting is only compounded where no standards exist or, as in this statewide contest, where there are no statewide standards for determining voter intent by the various canvassing boards, individual judges, or multiple unknown counters who will eventually count these ballots." Pet. App. 47a-48a.

[7] The majority's reasoning about "undervotes," appears to be that any mark on a ballot—such as a dimpled indentation—reflects an intent to vote, even if it is not counted by a machine. If that premise is accepted, then all of the machine-counted votes would also have to be examined manually so that ballots that include two "votes" for President can be excluded from the totals. The majority failed to address this logical extension of its reasoning, which, as the evidence before the trial court demonstrated, actually occurred. Trial Tr. 512-13 (witnessing instances where machine-counted vote included in totals also contained a "dimple vote" for another candidate).

that during the recounts, the standard to be applied in determining whether a vote is "legal" is whether there is a "clear indication of the intent of the voter." *Id.* at 34a (citing Fla. Stat. § 101.5614(5)). The majority provided no further guidance to the trial court, refusing to make provision for, among other things, "the qualifications of those who count," "whether a person may object to a counter," "what standards are used in the count," "the effect of differing intra-county standards," or "how one objects to the count." *See id.* at 48a (Wells, C.J., dissenting). Chief Justice Wells expressed his concern that the majority's prolongation of "this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis." *Id.* at 35a.[8]

In the wake of the majority's decision, the trial court implemented the supreme court's mandate by issuing orders near midnight on December 8 regarding how the recount would proceed. It ordered that by 8:00 a.m. December 9, 64 county canvassing boards were to begin segregating their "undervotes" with a goal of completing a recount by 2:00 p.m. on Sunday, December 10. Hearing Tr. 5, 7, 9 (attached to Petitioners' Supplemental Mem. In Support Of Emergency Application, No. 00A-504 (filed Dec. 9, 2000)). The trial court did not establish any uniform, statewide method for identifying and segregating undervotes, nor did it provide any instruction to avoid double counting previously counted ballots. Instead, it merely ordered each canvassing board to develop "some indication of the protocol purported or proposed" to segregate undervotes by noon on Saturday,

[8] Both dissents also pointed out that the majority's decision departs from the law as it existed on November 7. *See* Pet. App. 35a (Wells, C.J., dissenting) (majority's decision "has no foundation in the law of Florida as it existed on November 7, 2000"); *id.* at 55a (Harding, J., dissenting) ("the majority has established standards for manual recounts—a step that this Court refused to take in an earlier case").

December 9, 2000. *Id.* at 8. The trial judge instructed that the recount was to be conducted by some combination of judges, canvassing board employees, and "such other public officials" as the various counties deemed necessary in light of the schedule. *Id.* at 8-9. The trial court called upon judges in other counties to assist in the recount in order "to give *some* objectivity and partiality [sic] to the process itself, to reduce, to the extent possible any objections to the manner in which [the recount] was conducted." *Id.* at 9 (emphasis added). The trial court, however, expressly forbade objections to the vote recounts as they occurred, although observers could take notes and (in theory only) submit written objections later. *Id.* at 8-9.

The events that occurred in the wake of the majority's decision thus closely mirrored Justice Harding's warning: "Even if such a recount were possible, speed would come at the expense of accuracy, and it would be difficult to put any faith or credibility in a vote total achieved under such chaotic conditions." Pet. App. 55a (dissenting opinion).

SUMMARY OF ARGUMENT

I. The new standards, procedures, and timetables established by the Florida Supreme Court for the selection of Florida's presidential electors are in conflict with the Florida Legislature's detailed plan for the resolution of election disputes. The court's new framework thus violates Article II, § 1, cl. 2 of the United States Constitution, which vests in state legislatures the *exclusive* authority to regulate the appointment of presidential electors. *See McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

A. The multiple ways in which the Florida Supreme Court's decision has cast aside provisions of the statutory scheme governing elections also constitute violations of Article II, § 1 because they usurp the legislature's exclusive authority. These judicial departures include: the elimination of the Secretary of State's author-

ity to maintain uniformity in application of the election laws; disregard for the statutory provisions that require manual recounts to include "all" ballots; the substitution of courts for canvassing boards in determining ballot validity; and the imposition of *de novo* judicial review by courts of canvassing boards' certified judgments.

B. Because state constitutions cannot alter Article II's direct and exclusive grant of authority to legislatures, and because the Florida Legislature did not delegate to it the power to do so, the Florida Supreme Court did not have jurisdiction or authority to decide this case. The Florida Legislature has granted jurisdiction over election contests only to Florida circuit courts.

C. The Florida Supreme Court's decision repeatedly relies on its November 21 decision, which this Court had already vacated, and the consequences of that decision. This magnifies the Article II violations that the November 21 decision produced.

II. The Florida Supreme Court's revision of Florida's statutory system for resolving election disputes also violates 3 U.S.C. § 5, which gives conclusive effect to determinations of controversies or contests concerning the appointment of electors only if those determinations are made "pursuant to" "laws enacted prior to" election day and within the federally mandated December 12 deadline.

Section 5 is intended to "assure" States of "finality" in the determination of their presidential electors, and this Court has already cautioned the Florida Supreme Court "against any construction of [state law] that Congress might deem to be a change in the law." *Bush v. Palm Beach County Canvassing Board*, No. 00-836, slip op. at 6.

Although the court below acknowledged to the "stringent calendar controlled by federal law," Pet. App. 16a n.11, it ignored federal law altogether by imposing multiple changes on the statutory system for resolving

election disputes. Among other things, the Florida Supreme Court provided an extraordinary remedy that has no statutory basis, and its novel exposition of the contest provision essentially reads out other more specific provisions in Florida's Election Code.

III. The new set of manual recount procedures concocted by the Florida Supreme Court is arbitrary, standardless, and subjective, and will necessarily vary in application, both across different counties and within individual counties, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

A. The Equal Protection Clause forbids the state from treating similarly situated voters differently based merely on where they live. *See*, *e.g.*, *O'Brien v. Skinner*, 414 U.S. 524 (1974). Yet the various manual recounts ordered by the Florida Supreme Court will *necessarily* result in such differential treatment in violation of the Equal Protection Clause. The lack of uniform standards for counting "votes" means that voters who cast identical ballots in different counties will likely have their ballots counted differently. This is also true of the completed manual recounts that the Florida Supreme Court has compelled, or attempted to compel, the Secretary of State to include in the certified election results.

The new multi-tier recount scheme ordered by the court imposes several inherently different standards that also violate equal protection guarantees. It includes all newly identified "votes" from about one-fifth of the precincts in Miami-Dade County, but only orders the recount of a fraction of ballots identified as "under-votes" from the other 80 percent of the county. And, while solicitous of under-votes, the decision does nothing to account for "over-votes" in the machine count (which are also recorded as non-votes). Furthermore, by adopting varying levels of deference to the conclusions of different county canvassing boards, the court introduces even greater disparities in treatment.

B. Due process requires the application of clear and consistent guidelines based on prospective rules. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Yet the Florida Supreme Court's new election procedures are retroactive and anything but clear and consistent. In fact, they substantially deviate from practices established before election day. Changing the legal status of ballots after the election on the basis of selective, subjective, standardless, and shifting methods of manual recounting is fundamentally unfair. *See Roe v. Alabama*, 43 F.3d 574, 581 (11th Cir. 1995). Under the particular circumstances imposed by the court for the manual recounts, due process is further compromised because ballots are inevitably degraded during repeated machine inspection of ballots to segregate under-votes and by the manual recounts themselves. Moreover, the prescribed procedures adopted to implement the Florida Supreme Court's judgment deny parties any meaningful opportunity to object to subjective ballot determinations or to receive judicial review of those determinations. Finally, the Florida Supreme Court has also fundamentally changed the meaning and legal consequences of vote certification.

ARGUMENT

I. The Decision Of The Florida Supreme Court Violates Article II Of The Constitution

The Constitution expressly grants the legislatures of the several States plenary power over the appointment of electors, directing that electors shall be chosen "in such Manner as the Legislature thereof may direct." U.S. CONST. art. II, §1, cl. 2. As this Court has recognized, the Constitution "leaves it to the legislature *exclusively* to define the method of effecting the object [of appointing electors]." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (emphasis added). Indeed, the Framers' "insertion of those words" in Article II—"in such Manner as

the Legislature ... may direct"—undeniably "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Bush*, slip op. at 4-5 (quoting *McPherson*, 146 U.S. at 25).

The Florida Legislature enacted a carefully crafted statutory scheme to govern the appointment of presidential electors. In so doing, "the legislature [was] not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush*, slip op. at 4. By rewriting that statutory scheme—thus arrogating to itself the power to decide the manner in which Florida's electors are chosen—the Florida Supreme Court substituted its judgment for that of the legislature in violation of Article II. Such a usurpation of constitutionally delegated power defies the Framers' plan. The Florida Legislature never authorized judicial revision of the legislative structure it so meticulously conceived. Indeed, notwithstanding the rote incantation by a majority of the court below of the paramount role of the state legislature in this field, the court's key conclusions were simply pronounced without even the pretense of any statutory support.

This Court has recognized that the legislature's Article II power of appointment is exclusive. *See McPherson*, 146 U.S. at 34-35 ("'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states.'") (quoting with approval S. Rep., 1st Sess., 43d Cong., No. 395). Indeed, the Constitution contains provisions that vest responsibility in the States *qua* States, *e.g.*, U.S. CONST. art. I, § 8, cl. 16, as well as provisions that, as here, single out the particular branch of state government charged with exercising certain duties integral to the functioning of the federal government, *e.g.*, U.S. CONST. art. I, § 2, cl. 4. In light of the Constitution's precise distinctions among state legislative, executive, and judicial powers, the Framers' decision to vest specific authority in state legislatures

must be understood to be exclusive of state executive or judicial power to prescribe the "manner" of appointing electors. Thus, in the absence of a clear and express delegation of the appointment power by the legislature to a coordinate branch of government, the Constitution bars the exercise of that power by any other branch.

A. The Decision Below Overrides Numerous Provisions Of Florida Election Law

The decision below overrides numerous provisions of the detailed and specific statutory scheme enacted by the Florida Legislature. The resulting, judicially promulgated election scheme not only flies in the face of the specific language of the contest statute but also renders all but irrelevant the detailed statutory provisions addressing when and how canvassing boards may conduct manual or other recounts—including the requirement that any such recount must include "all ballots"—and the Secretary of State's duty and authority to ensure *uniformity* in the operation of the election laws by issuing opinions that are binding on the canvassing boards, the only bodies statutorily authorized to "count" votes. That new, judicially promulgated system is a plain violation of Article II.

First, assuming *arguendo* that the contest statute even applies to presidential elections, the court below simply disregarded the plain language of that statute.[9]

[9] The § 102.168 remedy by its terms does not extend to presidential elections, and it certainly does not authorize a contest action by a candidate for President (rather than by an unsuccessful candidate for presidential elector). Florida law instead establishes separate procedures for certifying the election of presidential electors and for replacing electors when appropriate, but makes no provision for a "contest" of the presidential election. *See* Fla. Stat. §§ 103.011, 103.021(5). The court's arbitrary extension of § 102.168 to a

As is clear from the face of the contest statute, what is "contested" is "the *certification*." Fla. Stat. § 102.168(1) (emphasis added). The deadline for filing a contest action runs from "the date the last county canvassing board . . . certifies the results of the election being contested," *id.* at §102.168(2); in any such action "the proper party defendant" "shall be" the canvassing board. *Id.* at 102.168(4). It would be hard to find language that more clearly indicates the legislature's intent to provide for judicial *review* of the certification decision, as opposed to a *de novo* examination of each purportedly disputed ballot without regard to the certified judgment of the body whose statutory duty is to count the votes. Not surprisingly, until the decision below, Florida law had long recognized that there is a "presumption that returns certified by election officials are presumed to be correct." *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1975). Specifically, certified election returns are "regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld." *Id*. at 268-69 n.5 (quotation omitted). Indeed, to overcome that strong presumption, an election challenger must show, as a threshold matter, that there has been "substantial noncompliance with the election statutes." *Beckstrom v. Volusia County Canvassing Bd*., 707 So. 2d 720, 725 (Fla. 1998).

By contrast, the decision below treats a contest as a *de novo* proceeding in which courts may treat the judgments of the canvassing boards and of the Secretary of State—including certification—as purely hortatory pro-

presidential "contest" is therefore itself a violation of Article II.

nouncements.[10] Those judgments thus become legally meaningless, since the circuit court *must* adjudicate the dispute without regard to any reasons, however compelling, that the canvassing boards or the executive may have had for certifying results as they did. Plaintiffs in the position of the Gore respondents thus need not "contest" the "*certification*," for the court will—indeed must—simply *ignore* it. In fact, under the ruling below, *certified* election returns are treated with *less* dignity than returns that have not been certified by either the county canvassing boards or the state election commission. While the *certified* election results from *all* other counties (except Broward and Volusia, where manual recounts produced over 700 additional Gore votes) are presumed *incorrect* and will be subject to *de novo* judicial review, the decision below requires that the *uncertified* results of manual recounts in Palm Beach County (adding 176 or 215 Gore votes) and Miami-Dade County (with 168 additional Gore votes based solely on partial results) be certified without *any* judicial review of their correctness (or any review of whether the certified results from these counties, in fact, "rejected legal votes").

The consequence of the court's ruling is nothing less than the evisceration of the internal coherence of the legislature's design. The legislature provided for canvassing boards, not courts, to count votes. Indeed, even the

[10] The court attempted to justify its decision to ignore the certification, and its imposition of "de novo" review, with the observation that, because "a protest is not a prerequisite for a contest," "[n]o appellate relationship exists between a 'protest' and a 'contest.'" Pet. App. 12a-13a. Certification, however, quite clearly *is* a prerequisite for a contest, and the statute provides no basis for ignoring certification merely because no "protest" need ever have been lodged before the election results were certified.

statute from which the court below claimed to derive its purportedly uniform "intent of the voter" standard—a statute that by its plain terms applies only to the initial canvass of votes when a ballot is *spoiled* or *damaged*, *see* Fla. Stat. § 101.5614(5)—expressly provides that whether a ballot reflects a "clear indication of the intent of the voter" is a determination to be made "*by the canvassing board*." *Id.* (emphasis added). *See also* Fla. Stat. §102.166(7)(b) ("If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented *to the county canvassing board* for it to determine the voter's intent.") (emphasis added). By revoking the canvassing board's legislatively conferred authority and ordering the *circuit court* to "commence the tabulation of the Miami-Dade ballots" and conduct its own *de novo* examination of which ballots are valid, Pet. App. 34a, the court below overrode the will of the legislature to repose responsibility for examining ballots in election officials with presumed expertise in this field (subject to the ultimate interpretive authority of the Secretary of State), and thereby violated Article II, § 1. *See* Pet. App. 45a (Wells, C.J., dissenting) ("Directing the trial court to conduct a manual recount of the ballots violates article II, section 1, clause 2 of the United States Constitution, in that neither this Court nor the circuit court has the authority to create the standards by which it will count the under-voted ballots").

Moreover, the legislature clearly anticipated that some elections might be close, and clearly provided rules on how to deal with that situation. In particular, the legislature has never prescribed manual recounts as the exclusive, or even preferred, methodology for discerning the intent of voters or for distinguishing "legal" from "illegal" votes. Instead, when an initial count of the election results demonstrates that the margin of victory for a candidate is less than one-half of one percent, an *automatic* recount must take place, unless the losing candidate does not desire such a recount. *See* Fla. Stat. § 102.141(4). A manual recount *may* be ordered at the

protest stage, subject to detailed requirements—including the requirement that "all ballots" must be counted when such a recount is ordered. *See* Fla. Stat. § 102.166. Under the scheme devised by the court below, however, there literally is no point in the safeguards provided for such recounts at the protest stage. Indeed, there is no point in any candidate or canvassing board *ever* going through the protest process or in conducting a manual recount. To achieve the result reached by the court below, the legislature might as well have dispensed with the bulk of the election code and simply provided for the shipment of all ballots to the circuit court immediately following the certification of the election results. Indeed, if Florida law could plausibly be read in the manner announced by the court below, the court's own earlier efforts—merely two weeks ago—to extend the certification deadline so as to permit additional manual recounts are completely inexplicable.

The Florida Supreme Court also approved the inclusion in the statewide election results of ballots (such as those from Broward County) that were counted as valid votes on the basis of mere "dimples" or indentations on the ballot. The Florida legislature has *never* provided that dimpled ballots should be counted as valid votes. To the contrary, counting "dimpled" ballots as valid votes violates the very statute relied on by the court below, Fla. Stat. § 101.5614(5), which requires "a *clear indication* of the intent of the voter as determined by the canvassing board" (emphasis added). Although the election code contemplates a certain level of discretion in how canvassing boards may elect to count votes, it also provides expressly for the means for cabining that discretion and binding those boards to a *uniform* counting standard: The Secretary of State is the "chief election officer of the state" and her duty is to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. § 97.012(1). The Florida Supreme Court's crazy-quilt ruling, by contrast, orders selective and partial recounts

conducted pursuant to varied and ever-shifting standards, thus expressly *mandating* a lack of consistency—in direct contravention of the legislature's unequivocal directive to achieve uniformity in the operation of Florida's election laws.[11]

Before the decision below, no statute in Florida had ever been interpreted as establishing the principle that "it is absolutely essential" to conduct a manual recount of all "undervotes" to determine whether a voter's intent can be divined from them. *Id*. at 15a. In every statewide election there are tens or hundreds of thousands of ballots that do not register votes and yet are not manually recounted. But if that recount principle were in fact an established fixture of Florida law, it would be hard to escape the conclusion that *all* ballots must be counted in the same manner in order to determine *each* voter's true "intent." For example, once the court believed, however erroneously, that the outcome of the election was "in doubt," it was irrational to require manually counting "undervotes" but not "overvotes"—the court's ruling would require courts to ignore the vote of anyone who clearly marked his ballot for a candidate and also wrote in the same candidate, resulting in his vote being disqualified as an "overvote" even though his intent is unmistakable. The legislative safeguards of § 102.166 (5)(c)—which provides that if a county canvassing board elects to conduct a manual recount, it "shall" "[m]anually recount *all* ballots" (emphasis added)—are plainly designed to avoid the dangers of selective, arbi-

[11] Because the Florida legislature has empowered the canvassing boards to determine what constitutes a "clear indication" of voter intent, the decision below also substitutes judicially mandated standards for standards that the canvassing boards had issued pursuant to legislatively delegated authority. *See* Stay App., Exh. J (Palm Beach County Guidelines providing that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote").

trary and incomplete results inherent in a partial manual recount. Indeed, because the legislature imposed "'a mandatory obligation to recount all the ballots in the county'" *before* certification in those cases in which a manual recount is appropriate, Pet. App. 26a), it is inconceivable that the legislature intended a partial recount to suffice for *overturning* those certified results.[12]

It is no answer to say that § 102.166's requirement that a manual recount must include *all* ballots has no applicability in a contest action under § 102.168. As Chief Justice Wells recognized, "it is only in section 102.166 that there are any procedures for manual recounts which address the logistics of a recount," and thus the two sections must be read consistently with one another—particularly where, as here, there was an initial protest filed in a county pursuant to § 102.166 and a subsequent contest of that county's return pursuant to §102.168. *See* Pet. App. 42a-43a (Wells, C.J., dissenting).

The decision below therefore ushers in a regime that cannot possibly be supported by any reasonable reading of the contest statute or any other provision of the Florida Election Code. The authority to count votes, entrusted by the Legislature to county officials subject to limited judicial review, has now been seized by the state judiciary, which *alone* now has authority to count votes and declare the election winner. A two-step process—administrative action followed by deferential judicial review—has been transformed by fiat into a unitary ju-

[12] Under the new legislative scheme adopted by the court below, an unrepresentative 20 percent of the ballots in Miami-Dade County will have been manually recounted and included in the certified total, whereas the remaining 80 percent (with the exception of the purported "undervotes") will not have been manually recounted at all. (As discussed below, this also constitutes a patent violation of the Equal Protection Clause.)

dicial examination of the ballots—one in which the circuit court may simply commandeer any county resources it might need to conduct its own counts. Indeed, because those counts have been untethered from the minimal statutory moorings that the legislature prescribed for vote-counting—such as bipartisan membership in counting boards—subjective concepts of equity jurisprudence are the only safeguard on which petitioners could rely to expect a fair evaluation of the disputed ballots. Especially given that there is no objective statutory standard—or, even now, any judicially created standard—for determining which partially perforated or "dimpled" ballots evince clear voter intent and are therefore "legal votes," there is no basis for believing that that necessarily *ad hoc* process would produce a result more reliable than that produced by the certified election results.

B. Article II Precludes The Florida Supreme Court's Exercise Of Jurisdiction

The Supreme Court of Florida lacked jurisdiction, as a matter of federal law, to enter the judgment below. Under Florida law, assuming *arguendo* that the legislature has authorized contest actions in presidential elections, only the circuit court possessed legislatively conferred jurisdiction to resolve the Gore respondents' claims. *See* Fla. Stat. § 102.168(1) (permitting election certifications to be "contested in the circuit court"); *id.* § 102.168(8) (authorizing "[t]he circuit judge to whom the contest is presented" to resolve contests).[13]

[13] Although petitioners' counsel responded to an oral argument inquiry in a manner expressing acceptance of that court's jurisdiction, petitioners promptly clarified their position in their post-argument brief in the court below. That brief noted that Article II confers sole authority on state legislatures to determine the manner of appointing electors, and that the legislature's authority "'cannot be taken from them

By contrast, the Florida Legislature granted *no* such jurisdiction to the Florida Supreme Court—a point seemingly recognized by the court below, which rationalized its authority to overturn the circuit court's judgment on the sole basis of the Florida Constitution. Pet. App. 1a (citing FLA. CONST. art. V, § 3(b)(5)); *see also Allen v. Butterworth*, 756 So. 2d 52, 63 (Fla. 2000) ("appellate jurisdiction of the courts of Florida is derived entirely from Article V of the Florida Constitution"). Article II, § 1 of the United States Constitution, however, does not permit state constitutions to circumscribe in any way a state legislature's selection of the manner of choosing presidential electors. *See McPherson*, 146 U.S. at 35 ("This power is conferred upon the legislatures of the states by the constitution of the United States, *and cannot be taken from them or modified by their state constitutions*.") (emphasis added) (quoting with approval Senate Rep., 1st Sess., 43d Cong., No. 395). Thus, because the Florida *Legislature* has conferred no role in reviewing contests over the results of a presidential election on the Florida Supreme Court, the

or modified by their State constitutions'" Pet. App. 102a n.1 (citations omitted). As petitioners explained, "equitable relief cannot lie because . . . 'the original and appellate jurisdiction of the Courts of Florida is derived entirely from article V of the Florida Constitution, *not* [from] the Florida legislature.'" *Id.* at 104a-105a (citation omitted). For that reason, the court below had no substantial basis for asserting that all parties "agree[d]" to that court's jurisdiction. *Id.* at 1a n.1. Indeed, even if petitioners had agreed to—rather than expressly challenged—the court's jurisdiction, that would not provide an adequate state ground for the court's exercise of jurisdiction in this case, because under Florida law, "'the parties cannot stipulate to jurisdiction over the subject matter where none exists.'" *Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997) (quoting *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994)).

court below lacked authority to enter its judgment, and the judgment below must accordingly be reversed.

This Court confronted a similar question in *Leser v. Garnett*, 258 U.S. 130 (1922), where it rejected a claim that several state legislatures, owing to provisions in their respective state constitutions, lacked the power to ratify the Nineteenth Amendment. The Court held that the state constitutions did not limit the legislatures' constitutionally delegated power, explaining that "the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State." *Id*. at 137. *See also Hawke v. Smith*, 253 U.S. 221, 227 (1920) (rejecting state constitutional limits on legislature's ratification power and concluding "[i]t is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed"). The Florida legislature's Article II power thus transcends any limitations sought to be imposed by the Florida Constitution.

Contrary to the Gore respondents' assertion, the supreme court's reliance on the state constitution as a purported basis for jurisdiction cannot be justified on the grounds that the courts must "assume that the Legislature passed [the contest statute] with knowledge of the prior existing laws." Stay Opp. Br. 12 (citation omitted). That principle of interpretation was not invoked by the court below, and in any event cannot be tortured into the proposition that the contest *statute* incorporates "the ordinary accouterments of appellate review of circuit court decisions." *Id*. That canon of construction, whatever it may mean in other circumstances, cannot mean that the legislature can simply be deemed to have granted to the state supreme court authority to review contest proceedings in cases where Article II must be observed. Because the legislature's power in this area is

"exclusive[]," *McPherson*, 146 U.S. at 27, there is no reason to suspect the legislature intended its statutory scheme to be "supplemented" with appellate review provisions it chose *not* to include in the statute itself. It would amount to a significant erosion of Article II if that grant of plenary authority to state legislatures could be deemed to have been delegated *sub silentio*.

In sum, the court below plainly altered the "manner" of appointing electors. The court was constrained by Article I, § 2 to follow the statutory scheme established by the legislature, but failed to do so, choosing instead to substitute a scheme of its own devise. Such an unauthorized exercise of constitutionally delegated power cannot escape this Court's scrutiny through the simple expedient of labeling it routine "judicial review" of a contest proceeding.

C. The Florida Supreme Court's Decision Is Improperly Predicated On Its Now-Vacated Opinion Of November 21, Perpetuating Its Article II Errors

Although this Court vacated the Florida Supreme Court's November 21 decision in part based on reservations concerning that opinion's compliance with, and consideration of, Art. II, § 1, cl. 2 of the United States Constitution, *Bush*, slip op. at 7, the decision below expressly rests—without explanation—on that earlier flawed decision. Such reliance on a prior vacated decision defies this Court's mandate, and extends the error of the November 21 decision, which was expressly predicated on the erroneous assumption that state constitutional provisions override legislatively mandated procedures for appointing presidential electors. The court's December 8 opinion thus represents an *ongoing* violation of *McPherson* and its requirement that the legislature *alone* may define the method of appointing electors.

Most prominently, the court below mandated that additional votes reflected in Palm Beach County's un-

timely returns be added to Vice President Gore's certified totals explicitly on the sole ground that the November 21 opinion "held that all returns must be considered unless their filing would effectively prevent an election contest from being conducted or endanger the counting of Florida's electors in the presidential election." Pet. App. 29a-30a. Tellingly, the court below failed to explain how its vacated decision is still even binding let alone how it squares with this Court's December 4 vacatur and remand with instructions to consider and follow federal law. *Bush*, slip op. at 7. In relying on its prior vacated decision without justification and without reconsideration, the Florida Supreme Court has flouted the mandate of this Court.

For example, because the Florida Supreme Court's November 21 decision has been vacated, the Secretary's alternate certification of a 930-vote lead for Governor Bush should be in effect before any contest recounts begin, but that is clearly not contemplated by the court below. On several separate occasions, the court below explicitly articulates a much smaller margin between the candidates, and assumes votes counted by the county canvassing boards after the statutory deadline had passed as valid votes for Vice President Gore. Indeed, two of the "errors" committed by the circuit court were in failing to count as valid votes "(1) the 215 net votes for Gore identified by the Palm Beach County Canvassing Board and (2) in not including the 168 net votes for Gore identified in a partial recount by the Miami-Dade County Canvassing Board." Pet. App. 3a-4a. These votes could only *possibly* count if the court's November 21, 2000 holding were still binding.[14] Moreover, the

[14] To be clear, the court below did not hold that the circuit court erred in merely failing to examine the Palm Beach and Miami-Dade County ballots and determine whether they were legal votes or not—such a judgment would not necessarily conflict with this Court's prior mandate—but in failing

court below also implicitly countenances the inclusion of the returns from Broward County's manual recount conducted after the Florida statutory deadline but before the judicially-created November 26 deadline. Pet. App. 30a.

II. The Florida Supreme Court's Decision Conflicts With 3 U.S.C. § 5

Congress has provided in 3 U.S.C. § 5 that "any controversy or contest concerning the appointment" of a State's electors should be resolved "pursuant to" "laws enacted *prior to*" election day. 3 U.S.C. § 5 (emphasis added). Two significant benefits follow from State compliance with the terms of §5. First, "it creates a 'safe harbor' for a State insofar as congressional consideration of its electoral votes is concerned." *Bush*, slip op. at 6. This alone advances the "'pervasive national interest'" in presidential elections by providing certainty and finality. *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983) (quoting *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975)). It embodies the congressional judgment that rules applicable to election disputes cannot fairly be changed once the voters have gone to the polls. *See* 18

to *automatically* include those votes as legal votes in the vote totals. Pet. App. 25a, 29a. Such conclusive deference is due a canvassing board determination—under the decision of the court below—only at the protest and not the contest stage of the proceeding. Pet. App. 13a. At the contest stage, the ballots—like the additional 9,000 Miami-Dade ballots—must be manually examined to discern voter intent, Pet. App. 32a, and any canvassing board determinations in this regard are mere "*evidence* that a ballot does or does not qualify as a legal vote." Pet. App. 28a (emphasis added). Thus, the Florida Supreme Court held that the Miami-Dade and Palm Beach County votes were properly counted at the protest stage of the recount process despite the fact that they were counted after the statutory deadline governing that process.

CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper) ("these contests should be decided under and by virtue of laws made prior to the exigency under which they arose"); *id.* ("How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?").

Section 5 thus creates a compact between States and Congress. By enacting laws prior to election day that seek to resolve potential controversies or contests concerning presidential electors, in accordance with its exclusive authority vested by Article II, the Florida Legislature sought to obtain for the State of Florida and its voters the protections that § 5 affords.

A second, and no-less-important, benefit of State compliance with the terms of § 5 is that it alleviates the need for Congress to intervene actively in a presidential election. Indeed, Congress enacted § 5 precisely to avoid a repetition of the near-cataclysmic result of its effort to resolve the presidential election of 1876. *See*, *e.g.*, 18 CONG. REC. 30 (Dec. 7, 1886) (remarks of Rep. Caldwell) (bill is intended to prevent repeat of "the year of disgrace, 1876"). Or, in the words respondents used in a prior brief to this Court: "Congress recognized that . . . it was essential to take 'this question out of the political cauldron.'" Gore Br., No. 00-836, at 24 n.14 (quoting 15 CONG. REC. 5079 (June 12, 1884) (remarks of Rep. Browne)). There is a strong federal interest in preventing questionable applications of state law that could force Congress to arbitrate divisive electoral disputes. The very purpose of § 5 was to avoid the chaos and confusion sown in the national polity by a protracted and unresolved dispute about the results of a presidential election—even in an individual State.

If this "principle of federal law" is complied with, *Bush*, slip op. at 6, the determination of an electoral dispute is entitled to "conclusive" effect and "shall govern

in the counting of the electoral votes," 3 U.S.C. § 5. As the language and history of the statute make clear, Congress has asserted its federal role in the context of presidential elections to "assure finality" to States' determinations of disputes as long as they comply with § 5's requirements. *Bush*, slip op. at 6.

Despite this Court's recent suggestion to the Florida Supreme Court that it is not free to disregard the Florida Legislature's decision to secure for the citizens of Florida the benefits of § 5,[15] and despite the Florida court's recognition that "because the selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, the Florida election law scheme must yield in the event of a conflict," Pet. App. 16a n.11, the court below has again ordered relief that fails to adhere to § 5's requirements—this time only four days before the December 12 deadline imposed by § 5. As Chief Justice Wells explained in his dissenting opinion:

> My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion.

Pet. App. 35a (Wells, C.J., dissenting). Reversal of the decision below is essential to preserve the protections that Congress sought to confer upon the States through § 5, to secure the certainty and finality of Florida's electoral process, and to ensure that Florida's electoral votes are accorded proper consideration in Congress.

[15] In *Bush,* this Court cautioned that "a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of [state law] that Congress might deem to be a change in the law." *Bush*, slip op. at 6.

As discussed in Part I above, the Florida Supreme Court's decision announces a substantial, judicially mandated change in Florida law and thus fails to determine the election dispute "pursuant to" the laws enacted prior to November 7, 2000. The changes in Florida law announced in the court's decision are numerous.

First, and most fundamentally, the extraordinary remedy provided by the Florida Supreme Court has no statutory support. Nothing in the Florida Election Code provides for the procedure and results mandated by the Florida Supreme Court, and there is no indication that such a remedy was ever contemplated by the legislature.

Second, as noted more fully above, *see* Part I.A, *supra*, the Florida Supreme Court's novel exposition of the contest statute effectively renders superfluous the more specific provisions regarding recounts. *See*, *e.g.*, Fla. Stat. §§ 102.141(4), 102.166.[16]

Third, by ordering that the results of a partial recount in Miami-Dade County be included in the certified results, the court effectively rewrote the statutory provisions in Fla. Stat. §§ 102.166(4)(d) and 102.166(5)(c) that require that "all" ballots be counted in a manual recount.

Fourth, the court's decision flatly disregarded the Florida Election Code by authorizing courts, rather than county canvassing boards, to determine the validity of a ballot. *See* Fla. Stat. § 101.5614(5).

Fifth, the court departed from the statutory language providing county canvassing boards with discretion to determine whether to conduct manual recounts in the first place, Fla. Stat. §§ 102.166(4)(c) and (5)(a)-(c), and

[16] The legislatively enacted statutory scheme must be read as a whole, which includes giving effect to the detailed provisions specifically governing recounts. *See* Pet. App. 39a, 42a-43a (Wells, C.J., dissenting).

instead directly ordered that manual recounts be conducted.

Sixth, the Florida Supreme Court created a new standard for determining whether a ballot should be deemed a legal vote, and included "dimpled" ballots as valid votes. Prior to the court's decision there was no such standard in Florida.[17]

Seventh, the court established a new multi-tiered standard of review in which some ballots will be reviewed by the trial court under a *de novo* standard and others will not be reviewed at all.

Eighth, the court's decision ordered that votes from Palm Beach and Miami-Dade Counties that were not submitted before either the seven-day statutory deadline (Fla. Stat. §§ 102.111 and 102.112) or the judicially fashioned November 26 deadline, must nevertheless be included in the statewide certification. The court's determination to include these votes in the final tally constitutes a further change in the law.

Finally, the Palm Beach County Canvassing Board's decision to count "dimpled" or indented chads as votes was a plain deviation from the County's prior, established written policy. The Palm Beach County guidelines on counting ballots, issued in November 1990, make clear that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote . . .

[17] The judgment below is also at odds with the previous policy that the counties undertook manual recounts only because of evidence of machine error and not solely because of the alleged failure of certain voters to fully punch through their ballot cards. During oral argument before this Court in *Bush*, the Florida Attorney General's office *could not name a single instance, prior to this year's presidential election, in which manual recounts were undertaken for mere voter error*. *See* No. 00-836, Or. Arg. Trans. 39-40 (Dec. 1, 2000).

an indentation is not evidence of intent to cast a valid vote." *See* Exh. J attached to Applic. for Stay, No. 00-A504; *see also* Trial Tr. 238-39 (testimony discussing 1990 standards).[18] Despite that previously announced standard, the Board changed its approach after the November 7 election and decided to count some ballots that would not have complied with its prior policy.[19] This change in policy by the organ of government granted the authority to conduct manual recounts fails to satisfy 3 U.S.C. § 5's express requirement that controversies be resolved pursuant to law as it exists prior to election day. By giving effect to that change in policy, the decision below compounds the noncompliance.

In each of these ways, the Florida Supreme Court's decision conflicts with § 5's requirements.[20] By an-

[18] That standard of what constitutes a vote was clearly reflected in the instructions given to Palm Beach voters on election day, which stated: "After voting, check your ballot card to be sure your voting sections are clearly and cleanly punched and there are no chips left hanging on the back of the card." *Touchston v. McDermott*, No. 00-15985, 2000 WL 1781942, at *6 n.19 (11th Cir. Dec. 6, 2000) (Tjoflat, J., dissenting).

[19] The Board's decision was triggered by a judicial ruling (itself a change in the law) that the Board could not have a per se rule against counting such ballots. *See Florida Democratic Party v. Palm Beach County Canvassing Bd.*, No. CL00-11078-AB, Trial Tr. 244-47 (Fla. 15th Jud. Cir. Nov. 15, 2000).

[20] Although the Florida court's decision purports to apply state law, the court was clearly cognizant of 3 U.S.C. § 5; yet its decision ultimately misinterprets that federal law and fails to heed this Court's admonition to avoid construing the Florida statute in this context to create newly announced changes in law. When the resolution of a federal question turns on whether state law has changed or a state court has adopted a

nouncing new, post-election changes in the law, the Florida Supreme Court's decision ensures that any change in the certified election results will not be "conclusive" under §5. The decision thus lacks binding effect on the parties and on the state election officials it seeks to command, and it places Florida's 25 electors at risk, thereby frustrating the Florida Legislature's choices in establishing a statutory scheme consistent with 3 U.S.C. §5.[21] These actions also frustrate one of the ob-

new rule of law in violation of federal constitutional norms, this Court will examine the state court's decision. *See*, *e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 353-55 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958) (This Court's "jurisdiction is not defeated if the non-federal ground relied on by the state court is without any fair or substantial support"; "in order that constitutional guaranties may appropriately be enforced, [this Court must ascertain] whether the asserted non-federal ground independently and adequately supports the judgment." (internal quotations and citations omitted)); *Lindsey v. Washington*, 301 U.S. 397, 400 (1937) ("[W]hether the [state-law] standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself." (citation omitted)); *see also Michigan v. Long*, 463 U.S. 1032, 1039 n.4 (1983) ("[W]here the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."); *Terre Haute and Indianapolis R.R. Co. v. Indiana ex rel. Ketcham*, 194 U.S. 579, 589 (1904) (to decline jurisdiction because state court relied on "untenable construction" of unconstitutional state law "would open an easy method of avoiding the jurisdiction of this Court").

[21] The court below acknowledged that "[t]he need for prompt resolution and finality is especially critical in presi-

vious objectives of both Article II and Title 3—confidence in presidential election results, which follows from assurances that elections are determined under rules in effect when the votes are cast. This Court's reversal of the Florida Supreme Court's decision is necessary to preserve these fundamental attributes of the federal and state compact embodied in § 5, a compact entered into by the Florida Legislature pursuant to its exclusive constitutional power to determine the manner of appointing Florida's electors.

III. The Florida Supreme Court's Decision Violates Equal Protection And Due Process Guarantees

The Florida Supreme Court's decision is a recipe for electoral chaos. The court below has not only condoned a regime of arbitrary, selective and standardless manual recounts, but it has created a new series of unequal after-the-fact standards. This unfair, new process cannot be squared with the Constitution.

A. Equal Protection

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote" *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). "The con-

dential elections where there is an outside deadline established by federal law," Pet. App. 31a, but conceded that, in light of its decision, "practical difficulties may well end up controlling the outcome of the election," *id.* at 32a n.21. The court made no effort to explain how the arbitrary and haphazard recount process it had invented could properly be conducted within the time limits established by federal law. Nor did it offer any justification for its decision to effectively override the legislature's decision to secure the benefits of § 5 for the State of Florida. Justice Harding explained the reality of the situation in his dissent by noting that the majority's remedy "is impossible to achieve and . . . will ultimately lead to chaos." *Id.* at 56a.

ception of political equality . . . can mean only one thing—one person, one vote”—“[t]he idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.” *Id*. at 558 (internal citations omitted).

The Equal Protection Clause prohibits government officials from implementing an electoral system that gives the votes of similarly situated voters different effect based on the happenstance of the county or district in which those voters live. *See*, *e.g.*, *Roman v. Sincock*, 377 U.S. 695, 707-12 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964) (state apportionment scheme “cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State’s citizens merely because of where they happen to reside”).

The new electoral system created by the Florida Supreme Court is not facially neutral, but even if it were, the disparate treatment of voters based on the counties or geographic regions in which they live would nonetheless violate the Constitution. In *O’Brien v. Skinner*, 414 U.S. 524 (1974), for example, this Court held unconstitutional the New York absentee ballot statute because it made no provision for persons who were unable to vote while they were incarcerated in their county of residence. Under the New York statute, “if [a] citizen is confined in the county of his legal residence he cannot vote by absentee ballot as can his cellmate whose residence is in the adjoining county.” *Id.* at 529. As a result, the Court held, “New York’s election statutes . . . discriminate between categories of qualified voters in a way that . . . is wholly arbitrary.” *Id.* at 530. The Court therefore concluded that “the New York statutes deny appellants the equal protection of the laws guaranteed by the Fourteenth Amendment.” *Id.* at 531.

Respondents attempts to distinguish *O’Brien*, arguing that it “stands only for the unremarkable proposition

that voters cannot be denied the right to vote solely because of their county of residence," and Florida voters, unlike the inmates in *O'Brien*, have not been "denied the right to vote altogether" on that basis. Stay Opp. at 19-20. That argument, however, ignores settled equal protection precedent, and does a significant disservice to the fundamental right to vote. As this Court has long recognized, the right to vote is "denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555.[22]

As in *O'Brien* and *Reynolds*, the necessarily disparate manual recounts ordered by the Florida Supreme Court arbitrarily treat voters differently based solely on where they happen to reside. For example, where there is a partial punch or stray mark on a ballot, that ballot may be counted as a "vote" in some counties but not others. The court's order also requires that ballots counted as part of the contest proceedings are evaluated under a different standard than ballots in other counties that have already completed manual recounts. Indeed, the "standards" used in those earlier manual recounts themselves constituted equal protection violations, since, to the extent "standards" existed at all, they varied widely from county to county, and even changed from day to day or hour to hour within a single Florida county. *See* 00-837, Pet. at 5, 11-13.

Respondents nonetheless assert that the Florida Supreme Court's so-called "standard" based on the "clear

[22] Respondents are also mistaken in suggesting that there can be no unconstitutional vote dilution when *additional* "votes" are counted. Stay Opp. at 20-21. As the Eleventh Circuit explained in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), if some ballots are counted improperly, other citizens' votes will be unconstitutionally diluted, even though the total number of votes may increase. *Id.* at 581.

indication of the intent of the voter" represents "a uniform, statewide standard" for conducting manual recounts. Stay Opp. at 19, 22. Indeed, respondents even goes so far as to call that infinitely elastic phrase "a clear standard—one that has been in place in Florida . . . for years," and one that "[t]he Florida canvassing boards and courts have long implemented." *Id.* at 22-23. Respondents' present characterization is strikingly different from reality and the position respondents took before the state courts. The Gore respondents conceded to the Florida Supreme Court in the earlier case involving the certification deadline that "different canvassing boards have used different standards." Gore Answer Br., Nos. SC 00-2346, -2348 and -2349, at vi <http://news.findlaw.com/cnn/docs/election2000/fsc1119gorerply.pdf>.

In addition, the decision below manifestly violates equal protection by mandating the inclusion of 168 votes based on a manual recount of 20 percent of the ballots in Miami-Dade County (from predominantly Democratic precincts), while ordering that only approximately 9,000 of the remaining 80 percent of the ballots be recounted —even though many of those ballots were cast by voters in predominantly Hispanic (and Republican-leaning) precincts. This patent violation is compounded by the fact that the judgment below disenfranchises numerous voters in Miami-Dade County and elsewhere whose ballots were rejected by the machine count as so-called "over-votes" but might upon manual inspection reflect a clear intent to vote for a particular candidate. *See* Pet. App. at 38a-39a n.26 (Wells, C.J., dissenting) (emphasizing disparate treatment of over-votes).[23]

[23] This disparate treatment of predominantly Hispanic communities in Miami-Dade County also violates §2 of the Voting Rights Act. *See* Bush Amended Br., No. SC00-2431, at 35 (Dec. 6, 2000). This Court has recognized that facially neutral changes in governmental structure that effectively discriminate against protected classes violate the Equal Pro-

The manual recount in Miami-Dade and the rest of the counties in Florida presents yet another intractable equal protection problem. The undisputed evidence at trial established that the very process of segregating undervotes from the rest of the ballots inevitably will identify as undervotes ballots that were *already counted* in the first (or second) machine counts, but not in the third pass through the machine. Trial Tr. 549 (34 precincts in Miami-Dade had more undervotes after segregating undervotes than were reported after the first recount). Votes that have already been included in the count may be counted *again*, after examination, as undervotes. Such double-counting of votes is a plain dilution of the votes of the remaining voters in violation of the equal protection clause. That equal protection violation with respect to Miami-Dade has already occurred, and would be exacerbated if more ballots were counted. Moreover, the decision below orders the rest of the counties in Florida to engage in the same sort of selective manual recount. Some "undervotes" would be segregated in that process that have already been included in the certified count, with the result that some votes would be counted and included twice.

By requiring further inconsistent and standardless recounts, the court's order guarantees disparate treatment for similarly situated voters. The equal protection violations are compounded by the fact that the court adopted a standard of "selective deference" to the decisions of the county canvassing boards. This conscious discrimination among voters on the basis of their county, or even precinct, of residence, violates the fundamental principle of equal protection that voters cannot be sub-

tection Clause, *see*, *e.g.*, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967), and no less is true for changes in government operations that dilute the fundamental right to vote.

jected to disparate treatment "merely because of where they reside[]." *Reynolds*, 377 U.S. at 557; *see id.* at 566 ("Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.") (citations omitted).[24]

B. Due Process

The Florida Supreme Court's radical departure from preexisting Florida law, and its failure to provide and apply clear and consistent guidelines to govern the manual recounts, also violates the Due Process Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). The facts here present "'an officially-sponsored election procedure which, in its basic aspect, [is] flawed.'" *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. 1981) (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1st Cir. 1978)), *cert. dismissed*, 459 U.S. 1012 (1982).

As explained above, the Florida Supreme Court has deviated substantially from the election law and practices in place prior to election day by ordering that the manual recount occur under circumstances and standards that have never before existed in Florida law, including fundamentally changing the meaning and legal consequences of certification of election results. *See*

[24] Respondents incorrectly assert that the one-person-one-vote rule of the Fourteenth Amendment has no application to "at-large" elections based on a "statewide vote." Stay Opp. at 21. A voting scheme that places more weight on votes from a particular county, particularly where that county is dominated by one political party, violates equal protection principles regardless of whether the election involves a "statewide" vote. *Roe*, 43 F.3d at 577, 581 (invalidating state ballot scheme in statewide elections).

Part I, *supra*. The court has therefore changed the rules yet again, and as a result, the contest is being determined by "rules" that were not in place when the votes were cast—in plain violation of the Due Process Clause. *See Logan*, 455 U.S. at 432; *Duncan*, 657 F.2d at 703; *Griffin*, 570 F.2d at 1077-79; *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970).

In *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), for example, the court of appeals held that the State of Alabama violated a group of absentee voters' First and Fourteenth Amendment rights when it departed from the State's longstanding policy of not counting unwitnessed absentee ballots. The court stated that such a post-election change in the way absentee ballots are counted violates fundamental fairness because it "would dilute the votes of those who met the requirements" and because "the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the [requirements]." *Id.* at 581. Here, as in *Roe*, ballots that would not have been counted as lawful votes on election day will necessarily have their legal status changed as a direct consequence of selective, subjective, standardless, and shifting methods of manual recounting.

It cannot be seriously argued that there have not been post-election changes to the "standards" used to count votes. Since 1990, for example, Palm Beach County has had a policy against counting mere indented or "dimpled" chad as valid votes. The Chairman of the Palm Beach County Canvassing Board testified that upon commencing the sample recount, the Board used these established standards declaring that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote." Trial Tr. at 239; *see also* Exh. J., Applic. For Stay, No. 00A504 (1990 policy declaring that a mere indentation "is not evidence of intent to cast a valid vote"). That understanding of what constitutes a legal vote was clearly reflected in the instructions given

to voters on election day. *See* n.18, *supra*. The county canvassing board, however, changed that policy post-election after litigation brought by Vice President Gore and his allies to require a more discretionary standard. *See* Don van Natta Jr. with David Barstow, *Elections Officials Focus of Lobbying From Both Camps*, N.Y. TIMES, Nov. 18, 2000, at A1. The "standards" used by other manual recount counties have undergone similar changes, Trial Tr. at 245-46, 497, 499 (Miami-Dade Supervisor would not count nonconforming ballot unless "there was a hanging chad by two points" during the sample recount, but then examined light penetration for the full recount). The decision below only magnifies the due process problem by replicating such changes, on a selective and unfair basis, throughout the State. Those changes alone constitute a clear constitutional violation.[25]

Respondents attempt to distinguish the due process cases upon which petitioners rely on the ground that the voter plaintiffs in cases such as *Roe* and *Briscoe* relied to their detriment on the preexisting election laws in determining how to cast their ballots, whereas in this case, no voter could have relied upon the standards by which voter intent is determined in voting. Stay Opp. at 22. Respondents are mistaken. Just as in *Roe*, Florida voters in, for example, Palm Beach County relied upon the definition of a legally valid vote reflected in the voter instructions they were given. Pursuant to those standards, voters who made some minor mark on their ballot but ultimately determined not to vote for any presiden-

[25] Respondents' reliance (Stay Opp. at 21) on *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998), is misplaced. That case did not involve the fundamental right to vote. Moreover, the unstructured and chaotic procedures mandated by the Florida Supreme Court are "arbitrary and irrational," and therefore would plainly fail the due process standard articulated in that case. *Id.* at 548 (Kennedy, J., concurring).

tial candidate had no notice whatsoever that that minor mark could later be counted as a vote. If they had received such notice, they could have examined their ballots after voting, determined that some minor mark appeared on the ballot, and requested a new one or otherwise corrected the stray mark. *See* Trial Tr. at 456 (voter who may have dimpled his ballot by "plac[ing the stylus] over the name of one of the candidates," before deciding he did not want to cast a vote for President).

Moreover, the candidates were also forced to make decisions regarding, *inter alia*, whether or not to seek manual recounts in certain counties (or how to respond to such recounts requested by their opponents). These decisions, like the decision of the voters described above, turned in part on the candidates' assessment of the kinds of standards and processes in place prior to the election, including the procedures that had been used in prior recounts. Thus, respondents' assertion that no one could have meaningfully relied upon the standards for determining voter intent in place on election day is simply mistaken.

In addition, if the State of Florida wishes to implement a manual recount procedure, it must ensure that meaningful guidelines are established for determining whether and how to conduct such a recount, rather than leaving such crucial decisions to the unbridled discretion and arbitrary decisionmaking of local election officials and as-yet unspecified other individuals who may have a keen personal interest in the outcome of an election. The court's failure to provide such guidelines constitutes a clear violation of the Due Process Clause.

With humans making subjective determinations about an absent voter's intent, without standards established by law, there is a very substantial risk that the method for determining how to count a vote will be influenced, consciously or unconsciously, by individual desire for a particular result. That risk is heightened significantly here because of the irreversible damage

done to the ballots during the recount processes and the clear errors that have occurred during the manual recounts.[26] Further manual recounts, by another varying and inconsistent set of arbitrary "standards," will not be accurate. They will simply compound the unfair and standardless methods that have been the hallmark of the Florida recount. As Chief Justice Wells warned in his dissenting opinion below: "The majority returns the case to the circuit court for this partial recount of undervotes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown. That is but a first glance at the imponderable problems the majority creates." Pet. App. 35a.

Finally, the chaotic and unfair procedures mandated by the Florida Supreme Court effectively deny the parties any meaningful opportunity to raise objections to ballot determinations made by nonjudicial counters during the manual recount, and preclude any chance for judicial review of those determinations. Under the decision below, the trial court delegates its judicial role under Fla. Stat. §102.168 to various county officials and other counters, and the trial court lacks the opportunity to review the ballots itself to form its own understanding of a particular voter's intent. Such sweeping denial of the opportunity to raise objections and obtain meaningful judicial review plainly violates the Due Process Clause. *See*, *e.g.*, *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930).

[26] For example, during the manual recount process, ballots were treated roughly and dropped, causing serious and material damage to the ballots, including dislodging and removing "chads" from ballots. Trial Tr. at484-85, 505-06. This type of degradation obviously limits the accuracy of each succeeding recount. *See* also 00-837, Pet. at 10-11.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

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Brief of Al Gore Jr. for in Opposition to Stay of the United States Supreme Court

No. 00-949

IN THE
Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Petitioners,

v.

ALBERT GORE, JR., ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I. Whether the Florida Supreme Court's decision interpreting and applying the provisions governing contest proceedings in Florida's Election Code according to established canons of statutory construction violates Article II, § 1, cl. 2.

II. Whether the Florida Supreme Court's decision is inconsistent with 3 U.S.C. § 5.

III. Whether the Florida Supreme Court's decision, enforcing Florida's contest provisions by ordering the manual review of ballots not counted by machines under the legal standard for determining their validity specified in Fla. Stat. § 101.5614, violates either the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below: Governor George W. Bush, as nominee of the Republican Party for President of the United States; Richard Cheney, as nominee of the Republican Party for Vice President of the United States; Vice President Al Gore, as nominee of the Democratic Party for President of the United States; Joe Lieberman, as nominee of the Democratic Party for Vice President of the United States; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, individually and as members of the Florida Elections Canvassing Commission; the Miami-Dade County Canvassing Board; Lawrence C. King, Myriam Lehr, and David C. Leahy, as members of the Miami-Dade County Canvassing Board, and David Leahy, individually and as Supervisor of Elections; the Nassau County Canvassing Board; Robert E. Williams, Shirley N. King, and David Howard (or, in the alternative, Marianne P. Marshall), as members of the Nassau County Canvassing Board, and Shirley N. King, individually and as Supervisor of Elections; the Palm Beach County Canvassing Board; Theresa LePore, Charles E. Burton, and Carol Roberts, as members of the Palm Beach County Canvassing Board, and Theresa LePore, individually and as Supervisor of Elections; and Stephen Cruce, Teresa Cruce, Terry Kelly, Jeanette K. Seymour, Matt Butler, John E. Thrasher, Glenda Carr, Lonnette Harrell, Terry Richardson, Gary H. Shuler, Keith Temple, and Mark A. Thomas, as Intervenors.

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INTRODUCTION

This case raises the most fundamental questions about the legitimacy of political power in our democracy. In this case, the Court will decide whether the Electors for President of the United States, and thus the President of the United States himself, will be chosen by ascertaining the actual outcome of the popular vote in Florida in the election of November 7, 2000, or whether the President will instead be chosen without counting all the ballots lawfully cast in that state. The Florida Supreme Court has determined, in a way that would be unremarkable but for the stakes in this election, that in order to determine whether lawfully cast ballots have been wrongfully excluded from the certified vote tally in this election, they must be examined. This is basic, essential, to our democracy, and to all that gives it legitimacy.

The central question posed by this case is whether any provision of federal law legitimately forecloses the Florida Supreme Court from interpreting, applying, and enforcing the statutes enacted by the Florida Legislature to determine all election contests and ascertain the actual outcome of the popular vote in any such election. See Fla. Stat. § 102.168; see also Florida Election Code, Fla. Stat. §§ 97.011-106.37. This process – which operates by popular vote and employs administrative and judicial processes when needed to ascertain which candidate has prevailed – is the only provision by which the Florida Legislature has established the manner of appointing Florida's Presidential electors in the 2000 general election. They are common provisions that have been adopted and utilized for decades in the vast majority of the States. See *infra*. These statutes expressly provide for "judicial determination" of any contest to determine the rightful winner of an election, as called for by 3 U.S.C. § 5. Those statutes having been faithfully applied by the Florida Supreme Court in this case, the question is whether this Court may properly override Florida's own state-law process for determining the rightful winner of its electoral votes in this Presidential election.

Such intervention would run an impermissible risk of tainting

the result of the election in Florida – and thereby the nation. For this Court has long championed the fundamental right of all who are qualified to cast their votes "and to have their votes counted." *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1964). Petitioners' request that this Court intervene in a state electoral process to ensure that votes are *not* counted turns *Sims* on its head. In the end, notwithstanding fears as to how "counting of [the] votes" may "cast[] a cloud upon what [Governor Bush] claims to be the legitimacy of his election," *Bush v. Gore*, No. 00-949 (A-504), Slip op. at 2 (Dec. 9, 2000) (Scalia, J., concurring), there can be little doubt that a count of the still uncounted votes, as the Florida Supreme Court ordered in this case, will eventually occur. The only question is whether these votes will be counted before the Electoral College meets to select the next President, or whether this Court will instead relegate them to be counted only by scholars and researchers under Florida's sunshine laws, after the next President is elected. Nothing in federal law, the United States Constitution, or the opinions of this Court compel it to choose the second course over the first.

OPINIONS BELOW

The opinion of the Florida Supreme Court in the contest proceeding is unreported and is set forth in Exhibit A to the application for stay. The order of the Leon County Circuit Court in that proceeding is unreported and is set forth in Exhibits B and C to the stay application. The opinion of this Court in a distinct but related case involving many of the same parties, see *Bush* v. *Palm Beach County Canvassing Bd.*, No. 00-836, Slip op. (U.S. Dec. 4, 2000) (per curiam) (hereinafter *Palm Beach County*), is reported at 2000 WL 1769093 and is set forth in Exhibit D to the stay application.

JURISDICTION

The Florida Supreme Court entered judgment on December 8, 2000. An application for stay was filed on the same day. On December 9, 2000, the stay was granted; the application was

treated as a petition for certiorari that also was granted. This Court has jurisdiction under 28 U.S.C. § 1257 to review the judgment of the Florida Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions at issue are reproduced in the appendix to this brief. See S. Ct. R. 24.1(f).

STATEMENT OF THE CASE

This case arises from a contest proceeding under the Florida Election Code to ascertain which Presidential candidate is the rightful winner of Florida's electoral votes in the 2000 general election. See Fla. Stat. § 102.168. Florida's election law establishes two distinct phases for the resolution of disputes regarding the outcome of an election. The first phase – the "protest" action – runs from election day through the certification of the election's results. It involves the reports of county canvassing boards to the Secretary of State and Elections Canvassing Commission, and the resolution by the county canvassing boards of any protests filed pursuant to Fla. Stat. § 102.166. This aspect of Florida's election law was before this Court in *Palm Beach County Canvassing*, *supra*, which sets out in more detail the factual background to this case. See *id.*, Slip op. at 1-4.

The second, post-certification phase for resolution of election disputes is the "election contest action" created by the Legislature in Fla. Stat. § 102.168. That law provides that "the certification of election * * * of any person to office * * * may be contested in the circuit court by any unsuccessful candidate for such office * * * or by any elector qualified to vote in the election related to such candidacy." One of the legislatively specified grounds for contesting any election is the "rejection of a number of legal votes sufficient to change or place in doubt the result of election." *Id.* § 102.168(3)(c). The Legislature expressly provided the state's courts with broad authority both to investigate claims in contest

actions and to fashion "any relief appropriate under such circumstances." *Id.* § 102.168(8).

Indeed, throughout the litigation over the certification results, petitioners themselves identified the contest procedure as the proper manner in which respondent Gore could seek a remedy for the problem of uncounted votes in Florida. See, *e.g.*, Answer Brief of George W. Bush before the Florida Supreme Court in *Palm Beach County Canvassing Bd.* v. *Harris*, Nos. SC00-2346, SC00-2348, & SC00-2349, at 18 (filed Nov. 19, 2000) (accusing respondent Gore of "substitut[ing] the certification process of Section 102.111 and Section 102.112 for the contested election process of Section 102.168 as the means for determining the accuracy of vote tallies"). As the Florida Supreme Court recounted in its opinion below:

> Bush's counsel, Michael Carvin, in the prior Oral Argument in *Palm Beach Canvassing Board* v. *Harris*, in arguing against allowing manual recounts to continue in the protest phase, stated that he did not
>
> > think there would be any problem in producing...that kind of evidence in an election contest procedure...instead of having every court in Florida resolving on an ad hoc basis the kinds of ballots that are valid and not valid, you would be centralizing the factual inquiry in one court in Leon County. *So you would bring some orderliness to the process, and they would be able to resolve that evidentiary question*.

Slip Op. 6 n.7 (emphasis added and omitted).

Accordingly, on November 27, 2000, following the certification of Governor Bush as the winner of the Presidential election in Florida, Vice President Gore followed petitioners' recommended course of action and commenced this election contest action under Section 102.168 in Leon County Circuit Court. The complaint raised five claims:

(1) it challenged the rejection of 215 net legal votes for respondent Gore identified by the Palm Beach County Canvassing Board that had been excluded from the certified vote totals, Complaint ¶¶ 3(a), 60;

(2) it challenged the rejection of 168 net legal votes for Vice President Gore identified by the Miami-Dade County Canvassing Board also excluded from the certified vote totals, *id.* at ¶¶ 3(a), 37;

(3) it challenged the inclusion in the certified totals of the election night returns from Nassau County in place of the machine recount tabulation required by Fla. Stat. § 102.141 to be used to determine the certified totals, *id.* at ¶¶ 3(b), 41;

(4) it argued that the court should review approximately 9000 Miami-Dade County ballots that were not counted by the machines,[1] because – among other reasons – review of approximately 2000 similar ballots by the county canvassing board yielded nearly 400 legal votes, *id.* at ¶ 3(d); and

(5) it challenged the rejection of 3300 legal votes in Palm Beach County during the county canvassing board's manual recount. *Id.* at ¶ 3(c).

Following a two-day trial, the circuit court entered judgment for petitioners and the other defendants on all claims. Final Judgment Order, Sauls, J. (Dec. 4, 2000). Three of the circuit court's determinations were relevant to its refusal even to examine the 9000 Miami-Dade County ballots that were introduced into evidence during the trial. First, the court held that the ballots

[1]These ballots are often called "undervotes." Tr. Contest Trial at 180 (Dec. 2, 2000). They are ballots which have not been counted as votes for President, notwithstanding that on visual inspection they may evidence a voter's intent to cast a vote for President.

should not be reviewed because the Miami-Dade County Canvassing Board did not abuse its discretion in terminating its manual recount pursuant to Section 102.166. Tr. of Ruling, Sauls, J. (Dec. 3, 2000), at 10. Second, the court held that respondent Gore was required to establish a "reasonable probability that the results of the election would have been changed" before the court could review the ballots and that respondent Gore had failed to carry that burden. *Id*. at 9. And third, the court held that, in an election contest action, the court may not review only the contested ballots but rather must review all ballots cast or no ballots at all. *Id*. at 12.

The Florida Supreme Court affirmed in part and reversed in part. The court affirmed the judgment regarding both the ballots from Nassau County and the rejection, after review, of 3300 ballots by the Palm Beach County Canvassing Board. Slip op. at 33, 35. The court reversed, however, as to the exclusion of ballots which the Palm Beach and Miami-Dade Canvassing Boards had determined to represent valid votes, holding that valid ballots may not be disregarded in an election contest simply because they were not identified prior to the close of the county certification process. *Id.* at 35. Most significant for present purposes, the court held that respondent is "entitled to a manual count of the Miami-Dade County undervote," but also that the Florida Election Code authorized as an appropriate remedy "a counting of the legal votes contained within the undervotes in all counties where the undervote has not been subjected to a manual tabulation." Slip op. at 2; see *id*. at 28-32, 38-40.

Mindful of the impending deadline for resolution of the contest action contained in the safe harbor provision of 3 U.S.C. § 5, the court reversed with instructions to the circuit court to "commence * * * tabulation of the * * * ballots immediately." Slip. op. at 39. On remand, after the Florida Supreme Court's decision, the state circuit court conducted a hearing – the very same evening – to establish practical guidelines and judicial supervision of the process to ensure the fairness of the recount. In election contest

actions, the Florida Legislature has specifically conferred this judicial authority to "fashion such orders as [the court] deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." Fla. Stat. § 102.168(8). The circuit court exercised that authority here to establish orderly procedures for a statewide manual count of undervotes throughout Florida. Tr. of Hearing Before the Hon. Terry Lewis (Dec. 8, 2000); Order on Remand (Dec. 9, 2000).

As to the roughly 9000 undervotes (ballots for which the machine did not record a vote) in Miami-Dade County, the circuit court established the following procedures: (1) beginning at 8:00 a.m. Saturday, the Miami-Dade County undervote ballots would be reviewed in the Leon County Public Library by the Supervisor of Elections of Dade County, in consultation with the Supervisor of Elections in Miami-Dade County; (2) the Supervisor would be permitted to rely on the Clerk of the Court and his staff; (3) two judges from the Second Judicial Circuit would oversee the counting teams; (4) those two judges would be directed to resolve any dispute about ballots; (5) if those judges could not resolve the dispute, Judge Lewis would resolve the dispute; (6) one person for the Democratic Party and one person for the Republican Party would be permitted to observe the count; (7) oral objections would not be permitted, but would be required to be reduced to writing and submitted to the state circuit court; (8) the counting room would be open to the public and the press; and (9) the circuit court would aim to complete the count by 2:00 p.m on Sunday. Lewis Hrg. Tr. 1-8; Order on Remand 1-2.

As for the other counties, the circuit court established the following guidelines: (1) only "undervotes" would be reviewed; (2) the Canvassing Boards would be directed to implement procedures for manually counting the votes, just as they have traditionally done under existing Florida law; (3) judges from throughout the State could be requested to help resolve disputes

that might arise during the recounts; (4) by 12:00 p.m. Saturday, December 9, 2000, the County Canvassing Boards would be requested to fax their plans, protocols, and estimated time schedules to the Leon County Court administrator for the court's review; and (5) the Boards would aim to complete their work by 2:00 p.m. Sunday. Lewis Hrg. Tr. 1-8; Order on Remand 2-3.

The circuit court applied the Florida Supreme Court's holding that the counting teams were to follow the traditional legal standard under Florida law, as set forth by the Supreme Court, for determining whether a valid vote has been cast. In short, the circuit court's guidelines set forth a conventional, uniform process for implementing the court-ordered counting of votes in accord with the Florida Legislature's designated manner of conducting elections. The procedures put in place promise to produce a full, fair, and accurate state-wide count of the undervote in accordance with the Florida Supreme Court's ruling that faithfully implemented the applicable provisions of Florida's Election Code, which unambiguously provides for judicial determination of election contests. See Fla. Stat. § 102.168.

By Order of December 9, 2000, this Court granted a stay halting the ongoing counts. The Court also treated the Stay Application as a Petition for Certiorari, which it granted.

SUMMARY OF ARGUMENT

This Court should immediately vacate its stay and affirm the Florida Supreme Court's judgment.

I. The Florida Supreme Court's decision is fully consistent with Article II, § 1, cl. 2. Petitioners' primary argument to this Court – which is flatly contrary to petitioners' position in the Florida courts – is that the mere assertion of appellate jurisdiction by the Florida Supreme Court violated Article II, § 1, cl. 2. This argument lacks merit because Article II, § 1, cl. 2 presupposes the existence of authority in each state to structure the internal processes and organization of each of its governmental branches;

judicial review and interpretation of Florida's election statutes is a necessary legislative assumption. In any event, the Florida Legislature *itself* drafted, proposed, and approved through bicameral passage the very provisions of its constitution that provide for appellate jurisdiction. The grant of jurisdiction contained in those provisions, as much as an ordinary Florida statute granting courts jurisdiction, thus was accomplished by the Legislature. Further, petitioners' newfound argument is also foreclosed by this Court's longstanding precedents. See, *e.g., Smiley* v. *Holm*, 285 U.S. 355 (1932); *State ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916); *McPherson* v. *Blacker*, 146 U.S. 1 (1892).

In addition, petitioners' pejorative characterizations of the Florida Supreme Court's decision are unfounded and highly irregular. In its ruling, the Florida court did not "make law" or establish any new legal standards that conflict with legislative enactments. Rather, the court engaged in a routine exercise of statutory interpretation that construed the Florida Election Code according to the Legislature's designated "manner" for choosing electors in a statewide election. See Fla. Sta. § 103.111.

II. Petitioners' argument under 3 U.S.C. § 5 is insubstantial. It is not at all apparent how petitioners' current incarnation of this argument even raises a federal question: it is clear – and not now contested by petitioners – that 3 U.S.C. § 5 simply establishes a safe harbor for States that wish to make use of it. There is no dispute here about the meaning of 3 U.S.C. § 5. And there can be no doubt that the Florida Supreme Court was attentive to the terms of the statute and took into account the relevance of 3 U.S.C. § 5 in determining the intent of the Florida Legislature. In any event, nothing in the decision below even remotely creates "new law" in a manner that runs afoul of the terms of 3 U.S.C. § 5, or that affects Florida's entitlement to that provision's safe harbor. The court engaged in a perfectly ordinary exercise of statutory construction, and it surely cannot be the case that the law "changes" when a jurisdiction's highest court settles the meaning

of state law. In fact, because the circuit court's decision departed from the plain language of the Florida Election Code, under petitioners' theory reversal of the judgment below will deprive Florida's electors of the safe harbor of Title 3.

III. Finally, the Florida Supreme Court's judgment is fully consistent with equal protection and due process. Until now, petitioners have steadfastly taken the position before the Florida courts that, consistent with settled Florida law, a contest action is the proper means by which respondent should challenge the vote count in this election. It is inconsistent for them now to object to the very contest procedure they previously endorsed.

Moreover, contest actions under Florida law relate only to the ballots which one side or the other contests – virtually every Florida election contest case involves a small fraction of the votes cast in the contested election.

In any event, the Florida Supreme Court's order to review the ballots from Miami-Dade County is consistent with established state law. The Florida Supreme Court's order of a manual tabulation of ballots that were recorded as "no votes" is also consistent with state law. Nor does the "voter intent" standard set by Florida law violate the Equal Protection Clause.

The Florida Supreme Court has ordered not the "selective" recount of which petitioners have complained but a *statewide* recount of all uncounted ballots in every Florida county that had not already completed a manual recount. Indeed, the Florida Supreme Court expressly *granted* petitioners the relief they sought with respect to a statewide recount; petitioners are in no position to complain about a point on which they prevailed.

Petitioners' allegations about the manner in which they say the manual counts have been conducted have no support in the record and are based on unsubstantiated rumors, untested "evidence," and biased ex parte submissions. In fact, the recounts have been conducted in full public view by counting teams made up of

representatives from different political parties, with the supervision of a three-member canvassing board that includes a sitting county judge and review by the Florida judiciary. The circuit court developed lengthy and detailed guidelines to ensure uniformity and accuracy. If there are anecdotal instances of isolated mistakes or inaccuracies during recounts, petitioners have ample remedies available to them under Florida law and Florida procedure to secure full redress. In the end, petitioners' argument amounts to a charge that the system of manual recounts, expressly authorized by Florida statute and previously used in innumerable instances over the years by Florida (and States throughout the country) is unconstitutional on its face. Such an ambitious and far-reaching claim has no legal support whatsoever.

The judgment should be affirmed. Because of the pressing need to complete the counting of votes, we ask that the stay be lifted immediately.

ARGUMENT

I. Article II Provides No Basis to Override the Florida Supreme Court's Decision.

Petitioners contend that the Florida Supreme Court's decision "established new standards * * * that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution." Stay App. at 2 (Question Presented 1).

Six days ago, in *Bush* v. *Palm Beach County*, No. 00-836, 531 U.S. __ (U.S. Dec. 4, 2000) (per curiam), this Court addressed a claim put forward by petitioner Bush that the decision of the Supreme Court of Florida in *Harris* v. *Palm Beach County* under the Florida Election Code's protest provision (Fla. Stat. § 102.166) ran afoul of this same constitutional provision. Petitioner there argued that "Article II precludes judicial lawmaking." See Bush Br. in *Palm Beach County* at 46. In particular, petitioner Bush relied upon *McPherson* v. *Blacker*, 146 U.S. 1, 35 (1892), for the proposition that, in interpreting state statutes relating to the

appointment of electors, the Florida court had run afoul of the provision of the U.S. Constitution giving the state legislature the power to determine the manner of appointment of electors. Petitioner Bush argued that the infirmity in the *Harris* decision was that the Florida court's construction of the provisions concerning certification of election results did not rest on "any statute." Bush Br. in *Palm Beach County* at 47. Petitioner Bush did not suggest that the Florida Supreme Court was disabled from exercising appellate review in that case – even though the protest provision of Section 102.166 (unlike the contest provision of Section 102.168) makes *no reference at all* to judicial review by any Florida court. Nonetheless, petitioner Bush freely acknowledged that the Florida Court could issue "directive[s] founded in pre-existing law." Bush Br. at 48. "Petitioner has never contended that state courts * * * are precluded by Article II from construing laws relating to elections." Bush Reply Br. in *Palm Beach County* at 9 n.6.

This much was common ground about Article II underlying this Court's per curiam opinion in *Palm Beach County.* This Court, of course, "decline[d] * * * to review the federal questions asserted" by petitioner Bush "to be present." Slip op. at 6. It did so because there was "ambiguity" about "the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the Legislature's authority under Art. II, § 1, cl. 2." *Id.* at 7. Specifically, this Court could not determine whether the Florida court intended that its conclusions rest solely upon traditional canons of statutory interpretation, or depended upon the state constitution as an independent and overriding source of law.[2]

[2] See *id.* at 5 ("There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.' The opinion states, for example, that 'to the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no "unreasonable or unnecessary" restraints on the right of suffrage'

Indeed, this Court *exercised* jurisdiction by vacating the judgment below. See *id.*

1. Recognizing that they have no good claim under the Article II theory presented to this Court just six days ago, petitioners now put forward a radical new proposition in the name of Article II: that the highest appellate court of the state may not exercise its ordinary appellate jurisdiction over decisions of lower state courts where its *jurisdiction* is granted by the state constitution rather than in legislation dealing specifically with presidential elections.

Even apart from the absurd theory that *McPherson* requires everything relevant to a state's process for choosing electors to be packed into a specialized presidential electoral code, the very premise of petitioner's argument is fatally flawed because the Florida Legislature re-enacted the contest statute in 1999 against the settled background rule that decisions of circuit courts in contest actions are subject to appellate review. See, *e.g.*, *Beckstrom* v. *Volusia County Canvassing Bd.,* 707 So. 2d 720 (Fla. 1998); *Harden* v. *Garrett*, 483 So. 2d 409 (Fla. 1985); *Bolden* v. *Otter*, 452 So. 2d 564 (Fla. 1984); *McPherson* v. *Flynn*, 397 So. 2d 665 (Fla. 1981). "It is an elementary principle of statutory construction that in determining the effect of a later enacted statute, courts are required to assume that the Legislature passed the latter statute with knowledge of the prior existing laws." *Romero* v. *Shadywood Villa Homeowners Ass'n*, 657 So. 2d 1193, 1195-96 (Fla. Dist Ct. App. 1995). Under Florida law, therefore, in referring to the "circuit court" in Section 102.168, the Legislature necessarily intended to encompass the ordinary accouterments of appellate review of circuit court decisions. Cf. *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the

guaranteed by the state constitution. App. to Pet. for Cert. 30a. The opinion also states that 'because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote' *Ibid.*").

law is."). Under Florida law, legislative provisions granting jurisdiction to the Circuit Court, without any express limitations, are always taken to include appellate review. See, *e.g.*, *State* v. *Sullivan*, 116 So. 255 (Fla. 1928); *Cote* v. *State*, 760 So. 2d 162 (Fla. Dist. Ct. App. 2000), *rh'g denied* (May 8, 2000). It accordingly is no surprise that the Legislature filed an *amicus* brief in this Court in the *Palm Beach County* matter that expressly recognizes the jurisdiction of the state's Supreme Court. Br. of Florida Senate & House of Representatives, No. 00-836, *Bush* v. *Palm Beach County Canvassing Board*, at 9 ("Florida has in place an election code for the resolution of disputes and a court system, *including a Supreme Court*, with the usual judicial powers of such courts." (emphasis added)). Thus, the statute itself supplies the necessary authority for review here.

Even petitioners do not try to explain why the Legislature would have wanted to endow a single circuit judge with final authority to decide these cases. Instead, all indications are that the Legislature intended this statute to be governed by the settled principle of Florida law that the state supreme court has appellate jurisdiction over all matters determined in the lower courts unless the Legislature expressly precludes such review. See, *e.g.*, *Leanard* v. *State*, 760 So. 2d 114, 118 (Fla. 2000) (Florida statutes are traditionally construed to preserve judicial review "rather than limiting the subject matter of the appellate courts"). That, of course, is a principle with which the Florida Legislature is quite familiar.

2. In any event, it is plain that Article II would not have been implicated at all had the court below premised its jurisdiction on the Florida Constitution, because Article II, § 1, cl. 2 presupposes the existence of authority in each state to structure the internal processes and organization of each of its governmental branches; and because, in any event, the Florida Legislature *itself* drafted, proposed, and approved through bicameral passage the very provisions of its constitution that provide for appellate jurisdiction. The grant of jurisdiction contained in those provisions, as much as

an ordinary Florida statute granting courts jurisdiction, thus was accomplished by an act of the Legislature, and nothing in Article II, § 1, cl. 2, requires that all the provisions bearing on the selection of presidential electors be located exclusively in a separate statute devoted solely to that end – even assuming that a legislature, exercising its power under Article II, could by express provision eliminate judicial review for any contests arising out of the choice of Presidential electors, or confine that review to the final determination of trial judges. The issue here is whether the Florida legislature has done that. It has not.

Under Florida law, an amendment or revision to the state constitution may be undertaken "by joint resolution agreed to by three-fifths of the membership of each house of the legislature." Fla. Const. art. 11, § 1. Pursuant to that method, the Legislature drafted, proposed, and approved the constitutional provision that confers jurisdiction on the state supreme court. See Fla. Const. Art. 5, § 3(b). That provision originated as a Senate Joint Resolution and was approved by concurrent votes of both houses of the state legislature in 1971. See S.J.R. No. 52-D (1971). It was ratified by Florida's voters in 1972. See West's Fla. Stat. Ann., Fla. Const., art. V. The relevant jurisdictional provisions of the constitution were further revised, again at the proposal and on the vote of both houses of the Florida Legislature, in 1980. See S.J.R. No. 20-C (1980); West's Fla. Stat. Ann., Fl. Const., art. V (historical notes).

This process plainly satisfies any Article II requirement that contests regarding presidential electors proceed under rules devised by the state legislature. That it was contained in a measure not dedicated to the presidency and the Electoral College as such is without constitutional significance. Petitioners could not respond to this seemingly self-evident point by arguing that nothing but state "legislation," and perhaps state "electoral college legislation," is contemplated by Article II. That provision's plain terms mandate only that a State's electors be appointed "in such Manner as the Legislature" thereof may direct; it does not require

that the legislature must act by enacting a bill into law, as opposed to other means of direction. Indeed, this Court has so held. See *McPherson* v. *Blacker*, 146 U.S. 1, 29 (1892).[3]

Nor is this conclusion undermined by the fact that state constitutional provisions in Florida, after proposal and passage by the Legislature, are ultimately ratified or adopted by the voters. Indeed, this Court has squarely held that the analogous constitutional provision in Article I, § 4, which vests state legislatures with the power to prescribe the manner for selecting representatives to Congress, is consistent with a legislative exercise of authority made subject to popular referenda. *See State ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916). By the same token, state legislation – which petitioners insist *must* govern presidential election disputes – is passed by the Legislature but takes effect only when approved by the *governor*. It is beyond peradventure that the presence of this part of the state lawmaking scheme does not violate a constitutional delegation to the state "Legislature," even when the executive power is used to *veto* legislation adopted by the Legislature. See *Smiley* v. *Holm*, 285 U.S. 355 (1932) (delegation to each State's "Legislature" in Art. I, § 4 of the authority to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, does not preclude the State's governor from vetoing a state congressional reapportionment law). The point therefore seems inarguable: in exercising jurisdiction in this case, the Florida Supreme Court acted in precisely the "[m]anner" directed by the Legislature.[4]

[3] Of course, it is common ground that the means chosen by the legislature are subject to constraints imposed by other provisions of the federal Constitution, for example, Article II, § 1, cl. 4, and the Fourteenth Amendment.

[4] Although it is not directly relevant here, we note that the same principles govern application of Art. 1, § 1 of the Florida Constitution, which was at issue in *Palm Beach County*. That provision also was approved by the Legislature and presented to the voters as part of a significant constitutional

Petitioners appear to argue that, under *McPherson*, the jurisdiction of the state supreme court may not be premised on the Florida Constitution because the U.S. Constitution "does not permit state constitutions to override a state legislature's selection of the manner of choosing electors." Stay App. at 25. But at most this case involves *interpreting* a state legislature's mode of selection, not *overriding* it. Moreover, in *McPherson*; the Court in that case noted, without question, that the Colorado Constitution of 1876 "prescribed" the selection of electors by the legislature of the newly admitted State. 146 U.S. at 33. Further, an 1874 Senate report quoted in *McPherson* referred to the appointment of electors as provided in a state constitution. See *id.* at 35 ("Whatever provisions may be made by statute, *or by the state constitution*, to choose electors by the people, there is no doubt of the right of the legislature * * * ." (emphasis added)).

Even under the most aggressive reading of *McPherson*, however, petitioners' argument is insubstantial.[5] As the Court indicated in *Palm Beach County*, *McPherson* might be read to suggest that it is impermissible for a state constitution to

revision and re-enactment in 1968. See *Florida Soc'y of Opthalmology* v. *Florida Optometric Ass'n*, 489 So. 2d 1118, 1122 n.2 (1986) (Ehrlich, J., specially concurring); Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 FLA. L. REV. 475, 476 n.8 (2000). At the time of that action, the Legislature surely was aware that the provision had long been understood to emphasize the importance of the right to vote. See, *e.g.*, *State* v. *Bird*, 163 So. 248, 252 (Fla. 1935).

[5] And, indeed, were it the proper reading, this Court would not have remanded in *Palm Beach County*. In that case, the Florida Supreme Court expressly relied on Article V of the Florida Constitution as the basis for its jurisdiction. See Slip op. at 5. This Court did not express any concern about the Florida court's exercise of its appellate jurisdiction in that case. Rather, it said that it could not precisely determine the "grounds for the decision" below. See *Palm Beach County Canvassing Board*, Slip op. at 6 (internal quotation marks and citation omitted). If this Court had thought that the mere exercise of jurisdiction under a state constitution was improper, it would not have had to remand the case for clarification.

"circumscribe the legislative power" regarding the process for selecting electors. 146 U.S. at 25. Whatever might be the rule where a state constitution was not passed by the state legislature, here, far from "circumscrib[ing] the legislative power," the Legislature *itself*, as noted above, proposed and passed the state constitutional provision that petitioners insist governed this action. And it surely cannot be the case that Article II of the U.S. Constitution *precludes* state legislatures from using state constitutional mechanisms to resolve controversies concerning electors, if that is the "[m]anner" of appointment that the legislature "direct[s]." Indeed, any such rule of preclusion necessarily would run afoul of petitioners' *own* reading of Article II, under which legislatures have *carte blanche* in determining the manner of appointment. Article II cannot be read to swallow itself.

Nor is this even a case where a constitutional provision initially promulgated by the Legislature was later asserted to *prevent* enforcement of a state statute, which was the issue raised by this Court's *Palm Beach County* opinion. Nothing of the sort is going on here. To the contrary, Article V of the Florida Constitution and Fla. Stat. § 102.168 are entirely consistent with one another – and there is every reason to believe that the Legislature intended and expected that participants in election contests would make use of the appeals process as a means of clarifying, interpreting, and enforcing the laws. Under petitioners' own approach, then, Article II of the U.S. Constitution *requires* that the right to appeal put in place by the Florida Legislature must govern here.

Finally, petitioner's argument is directly refuted by *State ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), in which this Court held that Article I, § 4, allowing States to prescribe the manner in which representatives to Congress are elected, does not preclude the state supreme court from exercising jurisdiction over such matters even though that jurisdiction is premised squarely on the state constitution. *Id.* at 568-70. This precedent completely

undercuts petitioners' argument that the Florida Supreme Court, by invoking its jurisdiction under Article V of the Florida Constitution, is completely disabled from playing its ordinary role as the highest court of the state when questions arise concerning the laws that relate to the appointment of electors. Indeed, *McPherson* itself was an original mandamus action in the Michigan Supreme Court. See 52 N.W. 469, 470, aff'd, 146 U.S. 1. This Court affirmed on the merits.[6]

3. Even if the Florida Supreme Court's authority were thought to stem only from the Florida Constitution, not the statute, and even if that constitution had not been enacted by the Legislature, exercise of that authority still would not violate Article II.

a. To begin with, the theories put forward by petitioner Bush

[6] In any event, this argument was not properly raised below. At oral argument, petitioners' counsel conceded in response to direct questioning that the Florida Supreme Court had jurisdiction in this case, despite Article II. After argument, petitioners filed an untimely "clarification of argument" that was not accepted by the Court below. Even in that filing, petitioners did not argue, as they do here, that Article II disabled the Florida Supreme Court from exercising appellate jurisdiction. To the contrary, they said only that the "relief" sought by respondent was barred by Article II. See Bush Clarification at 2-3.

This is an appeal from a state court judgment, under 28 U.S.C. § 1257. That statutory authority prevents this Court from deciding federal constitutional claims that are raised for the first time before it in appeals from state court decisions. See *Adams* v. *Robertson*, 520 U.S. 83, 88 (1997) (per curiam); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-39 (1969). Before a claim may be considered here on appeal, it must "'be brought to the attention of the state court with fair precision and in due time.'" *Street* v. *New York*, 394 U.S. 576, 584 (1969) (quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928)). This rule is mandated by principles of federalism that require respect for state courts which have acted in complete good faith in reaching decisions that may involve questions of federal law. In this case, petitioners were asked at oral argument, directly and repeatedly, whether Article II disabled the court below from adjudicating the appeal and they insisted that it did not. They *never departed from that position* before the Florida Supreme Court, even in their untimely post-argument submission.

in *Palm Beach County* and here are based on misreadings of Article II and of this Court's precedents. Should the Court in this case reach the issue reserved in *Palm Beach County*, it should conclude that a state court need not avoid use of the state constitution in construing legislation.

The state courts would be strange places indeed if Article II disabled them, in construing statutes enacted pursuant to constitutional grants of power to the "Legislature," from placing any reliance on state constitutions. The only authority cited by petitioners for that proposition, *McPherson* v. *Blacker*, actually supports the opposite conclusion: that the state courts, in interpreting state statutes enacted pursuant to the delegation of authority in Article II, *may* rely on all the sources of law they ordinarily bring to the task of interpreting state laws.

McPherson does state in dictum that the delegation to the legislature in Article II "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." 146 U.S. at 25. And undoubtedly it is true that, except by action of the legislature, the State could not purport to vest the power to direct the manner of the appointment of electors in any other body or individual.

But *McPherson* makes equally clear that, once a state legislature has enacted laws in exercise of its power to direct the manner of appointment of electors, the state courts may interpret those laws precisely as they would any other state legislative enactment. The Court's opinion explains that state statutes and the state constitution may be used by state courts in determining the precise scope of the right to vote for electors when such a right is conferred by state legislation. "Whenever presidential electors are appointed by popular election * * * [t]he right to vote [granted thereby] * * * refers to the right to vote as established by the laws *and constitution* of the State." 146 U.S. at 39 (emphasis added). Indeed, in *McPherson* itself, the state supreme court below had measured the statute providing for the appointment of electors for conformity with "the state constitution and laws," and this Court

concluded that it was "not authorized to revise the conclusions of the state court on these matters of local law." *Id.* at 23. This very conclusion is enough to dispose of petitioners' basic Article II claim: the state courts are not disabled from applying their state constitutions when they interpret legislation enacted pursuant to Article II.

Nor does Article II create a "state-constitution-free" zone in a state's law – even assuming it would be possible to pull the thread of state constitutional law out of the fabric of a state's law when administering or adjudicating questions bearing on elections for President and Vice President. State constitutions provide the necessary framework for a wide range of practices necessary to the conduct of elections held for the purpose of appointing electors, including a variety of actions by the executive and judicial branches of state government. Indeed, state constitutions determine the very nature and composition of the state legislature that is given the power to determine the method for the appointment of electors under Article II. Compare Fla. Const. art. III, § 1 (creating a bicameral legislature) with Neb. Const. art. III, § 1 (creating a unicameral one). They impose quorum requirements, qualifications of members, voting standards, and other rules necessary to enable the legislature to function. See, *e.g.*, Fla. Const. art. III, § 2 (members); *id.* § 3 (sessions); *id.* § 4 (quorum and procedures); *id.* § 7 (passage of bills); *id.* § 15 (qualifications). In a very real sense, the state legislature is a creature of the constitution that creates it, and any attempt to isolate one from the other would give rise to a host of unforeseen practical and legal problems.[7]

b. The threshold inquiry under Article II is whether the state

[7] The absurdity of petitioners' view can be illustrated another way: if a state legislature's "plenary" power over the appointment of Presidential electors cannot be circumscribed by any outside authority (including the state constitution), then it would seem to follow that this Court might well lack jurisdiction to entertain this very case, for Congress would have no authority to confer jurisdiction to review these matters under 28 U.S.C. § 1257.

constitution "circumscrib[ed] the legislature's authority," and here the application of the Florida Constitution is fully consistent with Article II because there is every indication that the Legislature intended to provide appellate review in contest actions, not eliminate it.

For example, suppose that the Legislature had enacted a provision stating: "To promote expeditious resolution of election disputes, there shall be no appellate review of the decisions of circuit courts in contest actions." If the Florida Supreme Court had held that provision invalid under the Florida Constitution, an issue would then arise under Article II regarding the validity of the provision for contests of Presidential elections. Here, where the constitutional provision for appellate review merely supplements the Legislature's scheme – much like judicial rules of procedure or evidence or principles of statutory construction – and does not invalidate a choice made by the Legislature, the principle set forth in *McPherson* is not implicated at all. See 146 U.S. at 39-40; see also *id.* at 24-26; *Leanard*, 760 So. 2d at 118 (Florida statutes are traditionally construed to preserve judicial review "rather than limiting the subject matter of the appellate courts").[8]

4. Petitioners also raise a claim that the Florida Supreme Court's decision violates Article II because the Court below "over[rode]" the state legislature in its construction of state law. App. for Stay at 25-27.

a. To begin with, there is no warrant in Article II, in *McPherson*, or in *Palm Beach County*, for the contention that some statutorily-based decisions of state law -- those with no "precedent," Stay App. 25 -- violate Article II because they are

[8] More generally, Article I of the Constitution states that "All legislative Powers herein granted shall be vested in a Congress of the United States." Petitioners' argument would seem to mean that this express grant of authority to the Legislature precludes judicial review. That, of course, has never been this Court's view. See, *e.g.*, *United States* v. *Morrison*, 120 S. Ct. 1740 (2000).

"legislative" and not "judicial" in character. Here petitioners essentially resurrect -- now in Article II guise -- the extraordinary *Teague* argument that they made in *Palm Beach County*. Cf. *Teague* v. *Lane*, 489 U.S. 288 (1989). They argue, with absolutely no authority, that "newly announced judicial extensions" of prior precedent in this context, Stay App. 25, violate the federal constitution.

But even *Teague* does not hold that "new rules" are *legislative* acts. Indeed, under *Teague* "new rules" *may* be announced by this Court on direct review of decisions of the State's highest courts. See, *e.g.*, *Johnson* v. *Texas*, 509 U.S. 350, 352 (1993). Under Article III, the federal courts are provided only with "judicial" authority; separation of powers principles prohibit them from "legislating." Yet, until now, it has never been suggested that these principles mean that federal courts cannot engage in statutory interpretation that amounts to a "newly announced judicial extension[]" of prior law. Petitioners' attack on the judicial function would disrupt state government by crippling the process of legislative interpretation at the time it is needed most.[9]

In any event, there are no judicial "extensions" involved in the

[9] The kind of federal superintendence over state court decisions petitioners would have this Court implement would also turn decisions like *Teague* on their head. *Teague* is animated by principles of federalism and respect for state courts as "coequal parts of our national judicial system." *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990). Petitioner would instead use a limitation on "new" judicial interpretations as a sword by which the federal judiciary, in challenges involving presidential electors, would supervise state courts' application of state law to determine whether those courts correctly discerned and applied local law. Petitioner would have the federal judiciary issue orders – pursuant to state law – regarding the details of state certification and contest procedures whenever the federal courts concluded that the state judiciary departed in any way from pre-existing state statutes. Far from honoring state courts, the standard proposed by petitioners would trigger dramatic federal intrusion into the state judicial process. This result cannot be squared with principles of federalism or with the long history of statutory interpretation by state courts in the post-election context.

decision below. The Florida Supreme Court employed the substantive standards expressly set out in the Florida contest provision, and the other Florida statutes on which it relied. Indeed, under petitioners' own theory, a reversal of the judgment below and a reinstatement of the circuit court opinion – which declined to use the standards contained in the plain text of the recently-enacted amendments to the contest provision – would violate Article II.

A discussion of the particular state law issues cited by petitioners confirms that the decision below is a routine example of statutory construction that is entirely consistent with Article II, and that petitioners' claims are nothing more than an impermissible attempt to persuade this Court to redetermine these state-law issues. Significantly, despite the division on the court below with respect to the relief granted, there was significant consensus with respect to the questions of statutory interpretation: six of the seven justices agreed on the issues of statutory interpretation. Slip op. at 13-20; see also *id.* at 61-63 (Harding and Shaw, JJ., dissenting). Petitioners' contentions before this Court ultimately reduce to empty assertions with little in the way of support.

First, petitioners claim that the Section 102.168 contest action does not apply to Presidential elections. However, as the Florida Supreme Court explained, Slip op. at 6 n. 7, petitioner Bush, the Florida Legislature, and the Florida Secretary of State all took the position before that court that the contest action was available. Indeed, petitioner Bush himself filed a third-party complaint in the circuit court in this case, invoking Section 102.168 with respect to the Presidential election.[10]

[10] The single case cited by petitioners– *Fladell* v. *Florida Elections Canvassing Comm'n* – was an intermediate appellate decision later vacated by the Florida Supreme Court, which expressly held that "the Court's rulings thereon are a nullity." See *Fladell* v. *Florida Elections Canvassing Comm'n*, Nos. 00-2372 & 00-2376, Slip op. at 4 (Fla. Dec. 1, 2000).

In an abrupt about-face, petitioner now suggests that, when a state legislature exercises its "plenary authority" under Article II, it must write specific rules to govern only that unique exercise of authority. This suggestion is both unjustified and unrealistic. If a legislature decides to hold an election to select Presidential electors, it typically assumes that all of the laws, rules, and regulations contained in the state election code will be applicable. And, indeed, all of the States rely on generally applicable provisions of their election laws in carrying out their periodic responsibility of selecting electors for President and Vice President.

Second, petitioners assert that the court below "essentially overruled" two subsections of Section 102.166 by ordering a recount of less than all of the ballots cast. However, as the Florida Supreme Court explained, the Section 102.166 protest remedy is entirely separate from the Section 102.168 contest remedy. Slip op. at 13; see also *id.* at 61 (Harding and Shaw, JJ., dissenting) (agreeing that the two remedies are separate). And whatever the restrictions on the county canvassing boards' authority under Section 102.166, the Legislature expressly granted the courts extraordinarily broad remedial authority in contest actions (see Section 102.168(8)), and it is that authority which is the basis for the determination below.

Third, contrary to petitioners' contention, Stay App. at 26, the court below did not rely on the prior opinion that this Court vacated in *Palm Beach County*. It merely pointed out that a canvassing board's failure to complete the recount by the date specified in the court's opinion (which governed protest remedies) did not forever bar any legal votes identified in that recount from being included in the ultimate vote totals (as a possible contest remedy). Slip op. at 34-35. Petitioners' reference to the Broward County votes, Stay App. at 26, is mystifying because the counting of those votes was not an issue in the court below.

Fourth – and somewhat inconsistently – petitioners attack the Florida Supreme Court for refusing to go beyond the statutory

standard for a legal vote – the clear intent of the voter, Fla. Stat. § 101.5614(5) – and hold that indented ballots may never constitute legal votes. Stay App. at 27. Here, the court's opinion simply recognizes and faithfully adheres to the statutory test; it is difficult to understand how this fidelity to the legislative enactments of the State could possibly violate Article II. If the court had gone beyond the express statutory provision to provide further guidance, petitioners would presumably have argued that such guidance impermissibly made new law.

b. It must be noted that the federal claim asserted in *Palm Beach County* is completely absent here. There is no indication whatsoever in the lower court's opinion that it "saw the Florida Constitution as circumscribing the Legislature's authority" under the federal Constitution. Indeed, the Florida Supreme Court clearly recognized the limitations imposed by Article II – it expressly acknowledged them at the outset of its opinion. Slip op. at 5 ("These statutes established by the legislature govern our decision today.") Accordingly, no federal question (and hence no basis for reversal) is even presented in this case under *Palm Beach County* or Article II.

Petitioners nonetheless impugn the Florida Supreme Court in general terms, arguing that it violated Article II when it "substituted its judgment for that of the legislature" and "rewr[ote] th[e] statutory scheme" governing the appointment of presidential electors in various respects. Stay App. at 23.

But here, unlike in *Palm Beach County*, the Florida Supreme Court's opinion makes clear that it did *not* rely upon the Florida Constitution even in *construing* the election law. The court based its interpretation on entirely conventional tools of statutory construction, including statutory text, traditional canons, and relevant precedents; in other words, it engaged in altogether routine statutory interpretation.

Petitioners' argument here thus is either that the Florida Supreme Court deliberately misrepresented the basis for its

decision by saying it was interpreting Florida statutory law when it was actually doing something else entirely – or that Florida's highest court seriously erred in interpreting Florida law. Either contention contradicts the "general rule" that "this Court defers to a state court's interpretation of state law." *Palm Beach County*, Slip op. at 4. And, were this Court to adopt petitioners' view of Article II, it would be required to second-guess every state law ruling by a state court bearing in any way on a presidential election to determine whether the lower court was attempting to disguise some other and improper basis for decision or had just gotten the state law wrong.

Nor is petitioners' argument consistent with this Court's decision in *Palm Beach County* in which the Court remanded the case for the Florida Supreme Court's clarification of the basis of that Court's decision.

Finally, as this Court is well aware, the process of statutory construction is the process of determining how to resolve issues that are not conclusively determined by the language of the statute. Unavoidably, petitioners take the position that Article II bars a court from engaging in this routine and obviously essential process: if an issue is not explicitly and unambiguously addressed in the language of the statute or in a prior decision that is precisely on point, then the court has usurped the Legislature's constitutionally delegated power. Nothing in Article II so limits the courts' authority. Indeed, the fact that the provisions for election contests in Section 102.168 apply broadly to *all* elections confirms the Legislature's intent that the courts are to exercise their usual role as neutral umpires who interpret the law to resolve disputes.

II. The Florida Supreme Court's Decision Is Consistent With 3 U.S.C. § 5.

The Court is by now familiar with petitioners' ever-shifting reading of 3 U.S.C. § 5. First, petitioners maintained that Section 5 was a flat federal prohibition on the determination of election

controversies through laws enacted after election day. Pet. for. Cert., No. 00-836, at 4-8. In their merits brief, they subsequently acknowledged that Section 5 on its face constituted only a safe harbor, but urged this Court to infer a broader prohibition as supposedly necessary to effectuate Congress' intent. Br. for Petr. Bush at 17-19, 27-29. Now, they attempt without explanation to convert this Court's direction in the *Palm Beach County* case that state courts should be aware of the safe harbor provided by Section 5 in determining legislative intent, see Stay App. at 29 (quoting *Palm Beach County*, Slip op. at 6), into a jurisdictional basis for this Court to invalidate the Florida Supreme Court's decision, *id.* at 30. Petitioners' argument fails both because Section 5 constitutes only a safe harbor from a challenge in Congress to a state's slate of electors and because the decision below did not constitute a change in Florida law.

1. ***The Florida Supreme Court Was Fully Attentive To The Impact Of Its Decision On The Safe Harbor Of 3 U.S.C. § 5.*** From the outset, the Florida Supreme Court was attentive to Section 5's requirements, consistent with this Court's directive that "a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law." *Palm Beach County*, Slip op. at 6. Thus, the court acted fully "cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. § 5," which statute the court quoted in full. Slip op. at 5-6. And the court made clear that its decision rests on the contest process set out in Section 102.168, "which laws were enacted by the Legislature prior to the 2000 election." Slip op. at 6.

2. ***The Text And Legislative History Establish 3 U.S.C. § 5 Exclusively As A Safe Harbor***. Petitioners' attempt to derive a judicial remedy from 3 U.S.C. § 5 conflicts with Congress' avowedly narrow purpose in enacting the statute. As respondent developed at length in his opening brief in the *Palm Beach County* case, see Resp. Br. at 21-30, and as we recount more summarily

here, 3 U.S.C. § 5 serves *no purpose* other than to insulate a state's slate of electors from challenge in Congress. Section 5 purports to set out a rule by which the Houses of Congress shall determine which electors for President of the United States from a particular State will be entitled to have their votes counted if more than one return purporting to contain the electoral votes of that State is received by the President of the Senate. Tellingly, Florida's own Legislature, appearing as an *amicus* before this Court in the *Palm Beach County* case, rejected petitioners' broader reading of Section 5.

The statute provides that "if" certain rules are followed by a State in making its "final determination of any controversy or contest concerning the appointment of all or any of the electors of such State * * * such determination * * * shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5. The regulation "hereinafter" to which the statute refers is 3 U.S.C. § 15, which announces a rule by which the Houses of Congress will decide which electors' votes are to count when the President of the Senate receives "more than one return or paper purporting to be a return from a State." 3 U.S.C. § 15. In such a case, Section 15 provides that "those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made." *Id.*

The legislative history of 3 U.S.C. § 5 confirms the understanding that it is focused exclusively on Congress and provides only an option. That history establishes conclusively that the statute's only purpose and effect is to provide each State with a way to guarantee that its electors will not be subject to challenge in Congress at the time the electors' votes are tabulated pursuant

to the Twelfth Amendment.[11] Indeed, supporters of the bill took great care to address and refute without contradiction precisely the construction of Section 5 that petitioners now erroneously press 110 years later. These supporters explained that the statute could not result in the invalidation of a State's votes but provided only a safe harbor against a challenge in Congress to the State's slate of electors. *E.g.*, 15 CONG. REC. 5547 (June 24, 1884) (statement of Rep. Herbert). And Representative Eden made virtually the identical point: "The States are entirely free under the Constitution to adopt the mode of appointment of electors that the legislatures thereof may prescribe. * * * *The bill contemplates no exclusion of electoral votes from the count because of the failure of a State to settle disputes as to the lawful vote of the State.*" 18 CONG. REC. 75 (Dec. 9, 1886) (emphasis added).

Petitioners cannot successfully convert their argument under 3 U.S.C. § 5 into a claim under Article II of the Constitution by maintaining that the Florida Supreme Court overrode the will of the Legislature by taking the state outside the safe harbor of Section 5. The wish to avoid challenge to its electors represents an important indication of a State Legislature's intent, but that wish is not the only one to be taken into account. There is no question, for example, that a state legislature *can* intend to take a State out of the safe harbor to achieve some other objective and a state court's overriding obligation remains to interpret the terms of the statute as the State Legislature enacted it. Under Section 5 as enacted, "Congress does *not* command the states to provide for a determination of the controversies or contests that may arise concerning the appointment of the electors, does not even declare it to be the duty of the states to do so, but *simply holds out an inducement for them so to act*." John W. Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633, 635 (1888) (emphasis added); see also Paul L. Haworth, THE HAYES-TILDEN DISPUTED

[11] As detailed in respondent's opening brief in the *Palm Beach County* case, at 23 & n.14, Sections 5 and 15 were a direct reaction to the Hayes-Tilden matter.

PRESIDENTIAL ELECTION OF 1876, at 305-06 (1906) (law "provides that a state may finally determine every contest connected with the choice of electors, but that such determination must be made in accordance with a law passed before the electors are chosen and that the decision must have been made at least six days before the meeting of the electors. Where such a determination has been made, it must be accepted * * * ."). The legislative history specifically reflects a recognition that a State was free not to take advantage of Section 5's safe harbor, with the only implication being that the State's electors would be subject to challenge in the Congress. *E.g.*, 18 CONG. REC. 30 (Dec. 7, 1886) (report by Select Committee on the Election of President and Vice President, accompanying Senate Bill 9).[12]

3. ***The Decision Below Does Not Change Florida Law And Therefore Does Not Affect Florida's Entitlement To The Safe Harbor Of 3 U.S.C. § 5***. Petitioners err in asserting that the Florida Supreme Court's decision "makes new law" in numerous respects.[13] First and foremost, the decision below is in all respects entirely with longstanding Florida election law. *E.g.*, *Beckstrom*

[12] If there remains any ambiguity about the appropriate reading of Section 5, it should nonetheless be interpreted as only a safe-harbor provision in order to avoid constitutional questions under Article II and settled principles of federalism. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). A congressional attempt to rearrange the constitutional structure of state government – for example, by purporting to preclude judicial involvement in state election disputes that the state has sought through its own constitution and laws to provide – is one of the few sorts of intrusion upon state sovereignty that might well be unconstitutional even after this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). See *id.* at 556 (citing *Coyle* v. *Oklahoma*, 221 U.S. 559 (1911)) (invalidating a congressional attempt to relocate a state capital).

[13] Given the nature of the briefing in this proceeding, in which respondent apparently will have no opportunity to address issues raised for the first time in petitioners' brief, it is of course essential that petitioners' arguments on the merits be constrained to those raised in their application for a stay.

v. *Volusia Cty. Canvassing Board*, 707 So. 2d 720 (Fla. 1998); *Boardman* v. *Esteva*, 323 So. 2d 259 (Fla. 1975); *State ex rel. Peacock v. Latham*, 170 So. 819 (1940), 170 So. 309 (1936), 170 So. 472 (1936); *State ex rel. Nuccio v. Williams*, 97 Fla. 159, 120 So. 310 (1929); *Darby* v. *State*, 73 Fla. 922, 75 So. 411 (1917)

Second, petitioners assert that the decision below conflicts with a 1992 Florida appellate decision describing the discretion of a canvassing board to hold a manual recount in a protest proceeding. Stay App. at 30 (citing *Broward County Canvassing Bd.* v. *Hogan*, 607 So. 2d 508, 510 (Fla. Dist. Ct. App. 1992)). The cited decision is inapposite. First, the case now before this Court involves a *contest* rather than a protest; the two election schemes (Fla. Stats. §§ 102.166 &.102.168) are distinct. Second, in the present case Miami-Dade County made the decision to commence a manual recount, and the same court that decided *Hogan* held that completing the recount was "mandatory." Even if that single decision were in point, the decision of the Florida Supreme Court – a superior tribunal – on an issue of statutory interpretation could hardly be deemed a sufficient change in the law that Congress would have intended the state's electors to lose their presumed validity. Indeed, the contrary view would conflict with settled principles of judicial hierarchy by binding the Florida Supreme Court to follow the decisions of the inferior courts in such matters.

Third, petitioners make the related argument that the Florida Supreme Court's decision "effectively announc[es] a new standard that manual recounts are *required* in cases of claimed voter error." But petitioners do not even attempt to offer a page reference for this gross misreading of the decision below, which carefully explains that the statute requires one contesting an election to make a threshold showing that a sufficient number of legal votes have been rejected to place in doubt the outcome of the election. Slip op. at 22-23. Indeed, under petitioners' theory of 3 U.S.C. § 5, reversal of the Florida Supreme Court's judgment and reinstatement of the decision of the circuit court would deprive

Florida of the safe harbor. As six of the Florida Justices agreed, the circuit court failed to use the standards included in the statute on Nov. 7, 2000. And petitioners' challenge to the Florida Supreme Court's order directing manual recounts in each county – without regard to the counties' discretion – is entirely disingenuous: it was *petitioners* who argued that a statewide recount would be required in the event that respondents' contest of the 9000 uncounted Miami-Dade ballots was sustained. See Amended Brief of Appellees Bush and Cheney, in *Gore* v. *Harris*, Fla. S. Ct. No. SC00-2431, at 43 ("In a contest of a statewide election, a statewide recount is required by the Equal Protection Clause of the U.S. Constitution and Florida Statute Section 102.168.").

Fourth, Petitioners allege that the Florida Supreme Court changed the law by adopting a statewide standard requiring that "dimpled" ballots be counted in recount proceedings. Stay App. at 31. Of course, petitioners neglect to reconcile that contention with their due process and equal protection theories that the court's decision is unconstitutional because it supposedly *fails* to adopt standards for determining voter intent. We address the standard set forth by the Legislature and applied by the courts in this case *infra*, but it is enough to note here that petitioners do not even claim that the Florida Supreme Court's decision conflicts with any prior court decision or, more to the point, with any legislative enactment in this respect.

Petitioners' examples are most useful, we think, in demonstrating how their theory would require constant federal judicial superintendence over state procedures and state court rulings in Presidential elections. Federal judges would be called on to examine supposed inconsistencies between different rulings in a never-ending search for what law really is "new" and what law is "old." Indeed, petitioners' argument that courts faced with an election controversy may not provide an "answer * * * created after Election Day," Stay App. at 32, would seriously distort the normal application of state election laws, given the necessarily

retroactive nature of judicial decisionmaking. See *Harper* v. *Virginia Dept. of Taxation*, 504 U.S. 86 (1993). And federal courts would apparently scour the text of state court decisions for clues that state judges had applied state election laws to new circumstances – which until this case had long been regarded as a principal responsibility and virtue of state judiciaries, not a federal constitutional vice. Nor would the federal inquiry be limited to the state courts, for petitioners maintain that the safe harbor of 3 U.S.C. § 5 evaporates upon a mere change in ballot procedures by a *single county canvassing board*. See Stay App. at 32 (asserting violation of Section 5 based on supposed change in Palm Beach County's treatment of "dimpled" ballots: "This change in policy by the organ of government granted the authority to conduct manual recounts fails to satisfy 3 U.S.C. § 5's express requirement that controversies be resolved pursuant to law as it exists prior to election day."). Yet some such adjustments must occur repeatedly in every state in every election. It is simply not credible to suggest that this everyday state of affairs regularly operates to eliminate the protections of safe-harbor provisions.[14]

Petitioners' argument is thus inconsistent with the longstanding practice of state courts, as well as attorneys general, to interpret and construe state election statutes as necessary to resolve post-election disputes.[15] Florida courts have routinely engaged in post-election statutory interpretation. See, *e.g.*, *State ex rel. Peacock* v. *Latham*, 170 So. 475, 478 (Fla. 1936); *State ex*

[14] Indeed, every time a court interprets a state election statute for the first time in the context of a Presidential election, it presumably makes "new" law in petitioners' view, thereby stripping the state of the safe harbor afforded by Section 5.

[15] See, *e.g.*, *State ex rel. Stephens* v. *Marsh*, 221 N.W. 708 (Neb. 1928); *State ex rel. Dahlman* v. *Piper*, 69 N.W. 378 (Neb. 1896); *Woods* v. *Sheldon*, 69 N.W. 602 (S.D. 1896); Miss. Op. Att'y Gen. No. 1999-0697, 1999 WL 1333481 (Dec. 22, 1999); Tex. Op. Att'y Gen. No. JC-0293, 2000 WL 1515422 (Oct. 11, 2000); Ark. Op. Att'y Gen. No. 94-366, 1994 WL 702001 (Nov. 21, 1994).

rel. Knott v. *Haskell*, 72 So. 651 (Fla. 1916); *State ex rel. Drew* v. *McLin*, 16 Fla. 17 (1876). The range of settled practices that would be drawn into question by petitioners' argument, or that would draw the availability of the 3 U.S.C. § 5 in question, is little short of staggering.

III. The Fourteenth Amendment Affords No Basis for This Court to Set Aside Florida's Established Statutory Proceedings for Determining the Proper Outcome of the Election.

A. There Is No Violation of the Equal Protection Clause.

Petitioners have pointed to two supposed equal protection problems arising from the remedy ordered by the Florida Supreme Court. First, petitioners contend that the Florida Supreme Court erred by ordering a statewide manual count of undervotes, thereby supposedly discriminating against those whose votes were counted by automated means. Second, petitioners contend that the inclusion for a manual recount of approximately 9000 undervotes from Miami-Dade County caused some votes to be counted twice and others to be counted using standards different from those applied to other Miami-Dade County votes. Supp. Mem. at 2 n.1. Neither allegation has merit.

To begin with, neither of petitioners' claims was raised properly below. It is important to appreciate the narrowness of the Fourteenth Amendment claim raised by petitioners before the Florida Supreme Court: Petitioners argued (in only one throwaway line, no less) that "the application of counting standards in different counties as well as the occurrence of manual recounts in only selected counties or selective portions of counties violates the equal protection and due process clauses of the U.S. Constitution." Amended Brief of Appellees George W. Bush and Dick Cheney at 45 (Exh. H to Stay Application). No other Fourteenth Amendment claim was framed.[16]

[16] Petitioners' post-argument submission to the Florida Supreme Court,

Petitioners' Fourteenth Amendment arguments rest principally on the assertion that, if the manual count proceeds, similar ballots will be treated dissimilarly in different parts of the State. We note that, insofar as this argument is directed at pre-contest tabulations, it is out of place here; petitioners should have raised such claims in an election contest of their own. But more fundamentally, petitioners' contention simply finds no support in the law, and has sweeping implications for the conduct of elections. The court below was quite insistent that the counting of ballots must be governed by a *single* uniform standard: the intent of the voter must control. Of course, so long as the count is conducted by humans, it undeniably will be possible to allege some degree of inconsistency in the treatment of individual ballots – as is the case whenever the application of any legal standard (*e.g.*, negligence, public forum) is at issue. That will be true in *every* one of the many jurisdictions that provide for manual recounts; it is true whenever States provide for variation in the methods of voting from county to county (*e.g.*, optical scanners as opposed to less reliable punch card ballots), which is now the case in *every* State; and it was true *everywhere* prior to the introduction of mechanical voting machines, when all ballots were counted by hand. Petitioners' theory would mean that all of these practices violate the Fourteenth Amendment. Moreover, if petitioners mean to say that all votes must be tabulated under a fixed and mechanical standard (*e.g.*, the "two-corner chad rule"), their approach would render unconstitutional the laws of States that hinge the meaning of the ballot on the intent of the voter – and also would mean that the Constitution requires the disenfranchisement of many voters whose intent is clearly discernible. This argument, in our view, is wholly insubstantial. Similar arguments regarding the conduct of elections uniformly have been rejected by the courts.

In any event, if the standard set out by the Florida Court is not

"Clarification of Argument for Appellees George W. Bush and Dick Cheney" (Exhibit M to Stay Application), was not accepted for filing.

applied consistently, applicants will have recourse to the Leon County Circuit Court and, on appeal, to the Florida Supreme Court, either of which will be able to eliminate any inconsistency by determining itself which ballots meet the statutory standard.[17]

1. *The Florida Supreme Court's order to review the ballots from Miami-Dade County is consistent with established state law.*

The Florida Supreme Court's order to "remand this cause for the circuit court to immediately tabulate by hand the approximately 9,000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed," Slip op. 38, was consistent with established state law for handling contest actions. As such, it raises no substantial federal questions.

This holding was a rather straightforward application of the Legislature's injunction, in Section 102.168(3), against the exclusion of "a number of legal votes sufficient to change or place in doubt the outcome of the election," coupled with its command to the judiciary in the contest proceeding to "ensure that any allegation in the complaint is investigated, examined … to prevent or correct any alleged wrong." Sec. 102.168(8). Moreover, the Court's decision was premised on the trial court's finding of "less than total accuracy, in regard to punchcard voting devices utilized in Miami-Dade" County, *Gore* v. *Harris*, No. 00-2808 (Fla. 2d Judicial Cir. Dec. 4, 2000), and a holding of an Florida appellate court that the Miami-Dade Canvassing Board's decision to abandon its count was an abdication of its "mandatory obligation"

[17] And, indeed, Florida statutory law provides that opportunity with regard to any ballots that a candidate believes should not have been counted during a manual recount pursuant to Fla. Stat. 102.166, see App. 36 (complaining about standards used during previous manual recounts). See Fla. Stat. 102.168 (3)(c) (permitting a candidate to contest the inclusion of "illegal votes" in the certified election results).

under Florida law. *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Board*, 25 Fla. L. Weekly D2723 (Fla. 3d DCA Nov. 22, 2000). This remedy is well established under Florida law in election contest cases. See *Broward Cty. Canvassing Bd.* v. *Hogan*, 607 So.2d 508 (4th Dist. App. 1992); *Morse* v. *Dade County Canvassing Bd.*, 456 So. 2d 1314 (3rd Dist. App. 1984); *McQuagge* v. *Conrad*, 65 So.2d 1851 (Fla. 1953); *State ex rel. Carpenter* v. *Barber*, 198 So. 49 (1940); *State ex rel. Peacock* v. *Latham*, 170 So. 475 (1936); *State ex rel. Titus* v. *Peacock*, 170 So. 309 (1936); *Ex parte Beattie*, 245 So. 591 (1936); *Nuccio* v. *Williams*, 120 So. 310 (1929); *Ex parte Smith*, 118 So. 306 (1928); *Florida* v. *Knott*, 72 So. 651 (1916); *State ex. rel. Law* v. *Saxon*, 5 So. 801 (1889).

Fashioning such a remedy in no way violates the U.S. Constitution in general, or its Equal Protection Clause specifically. Targeting the vote count to those ballots that had not registered on machines that were found not be accurate by the trial court was a narrowly tailored remedy authorized under state law, that certainly does not discriminate against any group of voters on its face. Indeed, it is the exclusion of these ballots, not their inclusion, that would raise questions of unequal treatment. The Florida Supreme Court's order does nothing more than place the voters whose votes were not tabulated by the machine on the same footing as those whose votes were so tabulated. In the end, all voters are treated equally: ballots that reflect their intent are counted. It is of no constitutional import whether that intent is captured by a machine tabulation or one performed by election officials.[18]

[18] There has been some suggestion that further manual counting of ballots may produce a "degradation of the ballots," *see Bush, supra,* at 2 (Scalia, J., concurring). Yet this suggestion has scant support in the record, and there is ample evidence to the contrary. *See, e.g., Tr. 11-22-00, Morning Session, at 7, 13-14) (Remarks of Supervisor Leahy)*. More importantly, clearly the question of to what extent recounts of the ballots increase accuracy is a question for the state courts and state election official under state law, not for this Court to resolve.

2. *The Florida Supreme Court's order of a manual tabulation of ballots that were recorded as "no votes" is consistent with state law.*

The gravamen of petitioners' complaint concerning the manual recount has been its selectivity. Yet, in this case, the Florida Supreme Court ordered not a "selective" recount but a *statewide* recount of undervotes in every Florida county that had not already completed a manual recount. Indeed, the Florida Supreme Court expressly *granted* petitioners the relief they sought with respect to a state-wide recount, "agree[ing] with the appellees" that Florida statutes "require a counting of the legal votes contained within the undervotes in *all counties* where the undervote has not been subjected to a manual tabulation." Slip op. at 2 (emphasis added). Petitioners cannot complain of a ruling in their favor.

In any event, the availability of the manual recount as a standard post-election procedure is a long-standing feature of Florida law, and of the law of other States,[19] and has been repeatedly used as part of Florida's system of electoral checks and balances to ensure that all lawfully cast ballots are counted.[20] As

[19] At least 21 other states have enacted statutes allowing or even – as in Texas – encouraging the use of manual recounts to back up punch-card tabulation systems. Cal. Elec. Code § 15627; Col. Rev. Stat. § 1-10.5-102(3); 10 Ill. Comp. Stat. § 5/24A-15.1; Ind. Code § 3-12-3-13; Iowa Code § 50.48(4); Kan. Stat. § 25-3107(b); Md. Code § 13-4; Mass. Gen. Laws ch. 54, § 135B; Minn. R. 8235.1000; Mont. Code § 13-16-414(3); Neb. Rev. Stat. § 32-1119(6); Nev. Rev. Stat. § 293.404(3); N.J. Stat. § 19:53A-14; 25 Pa. Code § 3031.18; S.D. Admin. R. 5:02:09:05(5); Tex. Elec. Code § 212.005(d); Vt. Stat. § 2601l; Va. Code § 24.2-802(C); W. Va. Code § 3-4A-28(4); Wis. Stat. § 5.90.

[20] The uncontradicted evidence by both respondents' and petitioners' witnesses at trial was that a manual count of punch card ballots was necessary in close elections. Petitioners' expert witness, John Ahmann, testified that a manual count was advisable "in very close elections" (12/3/00 Tr. 442) and detailed ways in which machine deficiencies could result in intended votes not registering in a machine count (*id.* at 425, 430, 440-41, 443-45). Respondents' expert witness also so testified. (12/2/00 Tr. 78-87; see also *id.* 51-54, 63.) Petitioners' witness, Judge Burton, testified that it was possible to discern the clear intent of the voter in hundreds of ballots the

this Court has previously recognized, manual recount procedures, like those that are included in Florida law, are a completely ordinary mechanism for ensuring the accuracy of vote-counts in close elections. See *Roudebush* v. *Hartke*, 405 U.S. 15, 25 (1972) ("A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, §4."). Where some ballots apparently have not been counted, and there is reason to believe that evidence of a voter's intent may exist on the face of those ballots, it is an entirely reasonable remedy to direct a manual examination of those ballots to determine whether voter intent can be clearly ascertained. In that regard, the remedy of the Florida Supreme Court was to

machines did not register as a vote. (12/2/00 Tr. 278; see also *id*. 260-61, 271.) The trial court expressly found that "voter error and/or less than total accuracy in regard to the punchcard voting devices utilized in Dade and Palm Beach counties." (12/4/00 Tr. at 10.)

Many studies support the conclusion of the Florida Legislature, the trial court, and witnesses from all sides that machine counts produce inaccuracies. See, *e.g.*, Roy G. Saltman, *Accuracy, Integrity, and Security in Computerized Vote-Tallying,* U.S. Dep't of Commerce, National Bureau of Standards (1988); National Bureau of Standards Report, *Effective Use of Computing Technology in Vote-Tallying* (1978); Ford Fessenden, *Counting the Vote*, N.Y. TIMES, Nov. 17, 2000, at A1 (citing many voting machine manufacturers who say that machine inaccuracy ranged wildly in Florida on November 7, and quoting industry officials who state "the most precise way to count ballots is by hand"); David Beiler, *A Short in the Electronic Ballot Box*, Campaigns & Elections, July/Aug. 1989, at 39; Tony Winton, *Experts: Machine Counts Inaccurate*, AP ONLINE, Nov. 11, 2000 (noting that "officials in England and Germany consider manual counts to be more accurate than automated ones" and quoting computer scientists for the proposition that "problems with automated vote-counting equipment, especially the computer card punch type used in south Florida, have been well documented" and that error rates of two percent to five percent are routine); Marlon Manuel, *Recounts: Democratic Official Defends Method That Bush Opposes*, ATLANTA J. & CONST., Nov. 17, 2000, at A11 (quoting president of company that "sells ballot software to 12 Florida counties, including . . . Palm Beach, Miami-Dade and Broward" for the proposition that "[i]f they're trying to determine a voter's intent, they're not going to get it off our machine or any machine").

adhere strictly to the directive of the Florida Legislature that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Fla. Stat. § 101.5614(5).

It is important to note that petitioners do not claim that the Florida Supreme Court's order is discriminatory in any invidious manner; they do not claim that any citizens of Florida were improperly denied their right to vote; and there is no claim of any fraudulent interference with the right of anyone to vote. Petitioners make none of these claims, which in certain circumstances have provided the basis for federal intervention in state election procedures and/or findings of invalidity of such procedures. Instead, petitioners' contention here seems to be that there is some constitutional defect in a state procedure that permits manual recounts to occur for some votes which may have been missed (undervotes), but not all votes (*i.e.*, votes that were effectively counted by automated processes). The Florida process, however, provides citizens of each county, and candidates for office within each county, with equal rights: No votes can be "diluted" in the constitutional sense by a process that seeks simply to count the legally cast votes of citizens participating in an election whose votes may not have been recognized by an initial machine count.[21] All undervotes are treated the same way under the Florida Supreme Court's order. The Equal Protection Clause does not require that the Florida Supreme Court ignore the most

[21] The "dilution" cases petitioners cite, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964), and *Roman* v. *Sincock*, 377 U.S. 695 (1964), involve the one-person, one-vote principle under which voters from different districts cannot be given votes of unequal weight. That issue is not even presented where, although the election is conducted by individual counties, the winner is determined based on his statewide popular vote. Petitioners' heavy reliance on *O'Brien* v. *Skinner*, 414 U.S. 524 (1974), is equally misplaced. *O'Brien* stands only for the unremarkable proposition that voters cannot be denied the right to vote solely because of their county of residence. The Florida Supreme Court's order does not work any such irrational discrimination. Rather, the remedy fashioned is applied generally and equally to all undervotes in the state.

accurately counted vote totals while seeking to ensure that all votes are counted.[22]

The use of different vote tabulating systems undoubtedly will generate tabulation differences from county to county.[23] But this will be true "[u]nless and until each electoral county in the United States uses the exact same automatic tabulation (and even then there may be system malfunctions * * * .)." *Siegel* v. *LePore*, 2000 WL 1687185, at *7 (S.D. Fla. Nov. 13, 2000). As Chief Judge Anderson noted in the *Siegel* appeal: "No court has held that the mere use of different methods of counting ballots

[22] Many states expressly allow for county-by-county or precinct-by-precinct recounts. See, e.g., Cal. Elec. Code § 15621 (voter may request recount and specify counties in which recount is sought and order of precincts to be counted; voter must fund recount); Ind. Code § 13-12-11-1 (candidate entitled to recount, which may be conducted in one or more precincts); Iowa Code § 50.48(4) (any statewide candidate, upon posting bond, is entitled to a recount in "one or more specified election precincts" within counties); Kan. Stat. § 25-3107(b) (candidate (or voter) may request a recount of "the ballots cast in all or in only specified voting areas for the office for which such person is a candidate," with the recount method being at the discretion of requesting party; bond must be posted); Mont. Code §§ 13-16-211, 13-16-305 (any unsuccessful candidate can petition for a recount in specified counties upon posting bond; candidates can also petition a state court for a recount in one or more counties and in one or more precincts within each county, and court "shall order a recount in only the counties or precincts for which sufficient grounds are stated and shown."); N.J. Stat. § 19:28-1 (any candidate (or group of 10 voters) who believes that an error may have occurred can apply to state court for a recount of votes cast in any district or districts."); Tex. Elec. Code § 212.001(5) (campaigns or voters may request a recount, specifying the election precincts, grouped by county or otherwise, for which the recount is desired); Wis. Stat. § 9.01 (any candidate or voter may request a recount on ground of mistake or fraud; requesting party must post bond and identify specific locations where recounts are desired).

[23] Florida's 67 counties use four different voting systems: one county counts all votes by hand; one uses mechanical lever voting machines (votes recorded on counter wheel when voters pull lever); 24 use punch card voting systems; and 41 use marksense voting systems (optical scanners detect marks made on ballot). See Pet. App., Exh. A, submitted with petition in *Touchston* v. *McDermott* (Dec. 8, 2000); *Touchston* v. *McDermott*, No. 00-15985, 2000 WL 1781942, at n.16 (CA 11 Dec. 6, 2000).

constitutes an equal protection violation." *Siegel* v. *LePore*, 2000 WL 1781946, at *14 (CA11 Dec. 6, 2000) (concurring opinion). Indeed, the fact that counties have different ballot marking and counting systems demonstrates the value in having statutory checks and balances such as a manual recount process.[24] County-to-county variations of this nature do not violate the constitution. See, *e.g.*, *Wyche* v. *Madison Parish Police Jury*, 635 F.2d 1151, 1158 (CA5 1981) (legislative deviation from equality is permissible for purposes of administrative convenience, adherence to historical or geographic boundaries and recognition of separate political units).[25]

3. *The "voter intent" standard set by Florida law does not violate the Equal Protection Clause.*

The Florida statutory standard used in conducting manual

[24] For example, most counties in Florida utilize an optical scanning vote count system. That system performed with great accuracy during the presidential race, resulting in only a 0.3% undervote rate (4 in 1000 ballots). In contrast, punch card systems such as those used in Palm Beach, Broward and Miami-Dade Counties experienced a 1.5% undervote rate (15 in 1000 ballots) in the presidential race. The manual recount process can ameliorate some of the disparity created by the use of different marking and counting equipment. Such a system not only does not violate the Equal Protection Clause; it also enhances the equality of the voting process.

[25] Many legal standards require a finder of fact to examine evidence and make a judgment regarding intent. *Morissette* v. *United States*, 342 U.S. 246, 274 (1952) (intent is a question of fact for a jury). Will contests seek the intent of the decedent. Reliance on finders of fact to apply broad standards is ubiquitous. *Russell* v. *Gill*, 715 So. 2d 1114 (Fla. Dist. Ct. App. 1998) (where the terms of a contract are ambiguous, intention of the parties may be ascertained from all of the pertinent facts and circumstances); *Holland* v. *United States*, 348 U.S. 121 (1954) (evidence must be sufficient to convince criminal jury of the guilt of the accused beyond a reasonable doubt). Indeed, the law is full of standards that require judgment to ascertain intent. Federal juries in criminal fraud cases are instructed to consider the facts in evidence and that "[t]o act with intent to defraud means to act knowingly and with the intention or the purpose to deceive or cheat." O'Mally et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 16.07 (5th ed.).

recounts – ascertainment of the voter's intent, see Fla. Stat. § 102.166(7) – does not violate equal protection requirements. It is incorrect to assert, as petitioners do, that the standard for determining whether a ballot should be counted varies from county to county. The "voter intent" standard is the same throughout Florida, and the circuit court issued detailed guidelines to ensure that the manual counts proceeded in a uniform fashion. Each ballot must be reviewed ballot-by-ballot to determine the voter's intent in the context of the entire ballot. Arbitrary exclusions would violate the Florida statutory scheme. The Florida Supreme Court's instructions in *Harris* were given to prevent this result.

In its decision, the Florida Supreme Court reaffirmed the governing standard by which the recounts were to proceed – one that has been in place in Florida and countless other states for years: "the standard to be employed is that established by the Legislature in our Election Code which is that the vote shall be counted as a 'legal' vote if there is 'clear indication of the intent of the voter.'" Slip op. at 40 (citing Fla. Stat. § 101.5614(5)). The state circuit court issued detailed guidance based on this standard immediately after the Florida Supreme Court's decision. The Florida canvassing boards and courts have long implemented that standard, and vote totals certified in this and many previous elections reflect countless ballots manually recounted under this same standard. See, *e.g.*, *Darby* v. *State*, 75 So. 411, 413 (Fla. 1917). Indeed, the Secretary of State's November 14 certification included numerous manually counted votes for petitioners, including vote totals from heavily Republican counties.

Hence, the contention that the "intent of the voter" standard violates equal protection (or due process) is nothing more than an argument that the contest and recount procedures of Florida's election code, which mirror those that have long existed in one form or another in numerous States, are on their face unconstitutional. Manual counting and recounting of ballots under the intent of the voter standard has been the *rule*, not the exception, in this country for generations – indeed, for most of the

period since its founding. See *Bush* v. *Gore*, No. 00-949 (00A504) (U.S. Dec. 9, 2000) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting) ("intent of the voter" standard followed by Florida Supreme Court is "consistent with the prevailing view in other States"); see also *Delahunt* v. *Johnston*, 671 N.E.2d 1241 (Mass. 1996); *Pullen* v. *Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990); *Stapleton* v. *Board of Elections*, 821 F.2d 191 (CA3 1987); *Hickel* v. *Thomas*, 588 P.2d 273, 274 (Alaska 1978); *Wright* v. *Gettinger*, 428 N.E.2d 1212, 1225 (Ind. 1981); *Democratic Party of the Virgin Islands* v. *Board of Elections*, 649 F. Supp. 1549, 1552 (D.V.I. 1986) ("There can be no question then, that the intention of the elector must be paramount. Neither a regulation of the Board of Elections, nor a decision of the supervisor of elections, can supercede the requirement that where the elector's intent can be divined, it should be given effect.") (citation omitted)); cf. *NLRB* v. *Americold Logistics, Inc.*, 214 F.3d 935, 939 (CA7 2000) ("The Board's policy – and the rule in this circuit – is to count ballots when the voters' intent is clear, despite irregularities in the manner in which the ballots have been marked") (citations omitted); *TCI West, Inc.* v. *NLRB*, 145 F.3d 1113, 1115 (CA9 1998) ("The general rule in this Circuit and most other circuits, as well as the policy admitted by the Board is that a ballot should be counted where a voter's intent is clear, despite irregularities in the voter's mark.") (citations omitted); *NLRB* v. *Duriron Co.,* 978 F.2d 254, 257 (CA6 1992) ("A ballot should normally be counted if there is a clear expression of preference regardless of an irregularity in the voter's mark."); *Stapleton* v. *Board of Elections*, 821 F.2d 191 (CA3 1987); *NLRB* v. *Connecticut Foundry Co.*, 688 F.2d 871, 875 (CA2 1982) ("The general rule is that a ballot should be counted if there is a clear expression of preference, regardless of the irregularity of the mark on the ballot.") (internal quotations omitted); *Wackenhut Corp.* v. *NLRB*, 666 F.2d 464, 467 (CA11 1982) ("We seek to determine whether the Board's action here is consistent with the admitted Board policy of attempting to give effect to the voters' intent whenever possible") (internal quotations

omitted) (citing *NLRB* v. *Manhattan Corp.*, 620 F.2d 53 (CA5 1980); *NLRB* v. *Tiche-Goettinger Co.*, 433 F.2d 1045 (CA5 1970).

Moreover, with respect to the counting of punch card ballots, most States do not attempt specifically to define what particular appearance of the ballot is required before a vote is to be counted. Even those States that do have such standards usually have a "catch-all" provision permitting the counting of any ballot that "otherwise reflects the intent of the voter." *E.g.*, Tex. Election Code Ann. § 127.130(d)(4), (e) (2000) (vote to be counted if "indentation" on chad or other mark indicates clearly ascertainable intent of voter); Ind. Code Ann. § 3-12-1-1. At least 22 states have enacted statutes allowing – or even as in Texas encouraging – the use of manual recounts to back up punch-card tabulation systems. See *supra*.

Even in states that have adopted statutory guidelines to assist in ascertaining voter intent, the ultimate goal is to determine how a voter intended to vote. For example, the election code of Texas provides as follows:

> (d) Subject to Subsection (e), in any manual count conducted under this code, a vote on a ballot on which a voter indicates a vote by punching a hole in the ballot may not be counted unless:
>
> (1) at least two corners of the chad are detached:
>
> (2) light is visible through the hole;
>
> (3) an indentation on the chad from the stylus or other object is present and indicates a clearly *ascertainable intent of the voter* to vote; or
>
> (4) the chad reflects by other means a clearly *ascertainable intent of the voter* to vote.
>
> (e) Subsection (d) does not supersede any clearly *ascertainable intent of the voter*.

Tex. Elec. Code § 127.130 (emphasis added). The Texas statute, while providing guidelines for manually counting punch card ballots, thus establishes the intent of the voter as the paramount and overriding standard. Indeed, the guidelines set forth in subsection (d) are made expressly subject to this overarching standard. If the Florida standard is struck as unconstitutional, it is difficult to see how statutes such as the Texas election code could survive.

If petitioners have complaints about the treatment of particular ballots, or the treatment of ballots in particular locations, the Florida procedure now in place provides a perfectly suitable mechanism for addressing them: such complaints may be presented to the circuit court and tested on appeal. But rather than invoke that traditional remedy, petitioners would have the Court abruptly end the counting altogether and *toss out lawfully cast ballots that have been, and are now being, counted.* That is an absurd and unprecedented response to an asserted flaw in the process for tabulating votes, and one that surely is not required by the U.S. Constitution. In fact, if there is anything to petitioners' equal protection claim, the remedy is not to end the counting of votes; it is, instead, to articulate the proper standard and – as required by state law – to have the counting go forward under that standard.

B. There Is No Violation of the Due Process Clause.

Petitioners' claim under the Due Process Clause has no merit. First, any suggestion that the application of different counting standards by different counties raise due process concerns here is fatally flawed because petitioners have utterly failed to develop any record evidence to support their accusations in this regard and can offer only unconfirmed rumors and untested accusations. As described *supra*, recounts have in fact proceeded in an orderly and uniform fashion. Florida's manual recount system acts as an important check on the ballot counting process that promotes, not erodes, public trust in the electoral system. The manual recounts here, for example, were conducted in full public view by counting

teams made up of representatives from different political parties, with the supervision of a three-member canvassing board that includes a sitting county judge and review by the Florida judiciary. And the circuit court developed lengthy and detailed guidelines to ensure uniformity and accuracy.

Petitioners' allegations about the recount process are thus without any factual basis. Moreover, they are not even legally cognizable. Petitioners have failed to adduce proper evidence to support their claim. In any event, if there are isolated mistakes or inaccuracies during recounts, petitioners have ample remedies available to them under Florida law and Florida procedure to secure full redress. There is no warrant for holding the entire recount procedure unconstitutional on its face.

Petitioners' argument would have the unthinkable consequences of (i) overturning the settled "intent of the voter" standard; (ii) invalidating the entire election in Florida, in which many ballots already have been included in the certified totals as a result of manual counting, and (iii) calling into question numerous other results nationwide in a host of local, state, and national elections. Not surprisingly, petitioners' argument also flatly contradicts their representation of counsel before the Florida courts in the *Bush* v. *Palm Beach County Canvassing Board* litigation (quoted above), in which they urged that manual recounts should be conducted pursuant to a *contest* in order to minimize concerns regarding the standards for counting.

To the extent that petitioners' due process argument rests on the claim that the Florida Supreme Court imposed standards for counting the votes that were not in place when the votes were cast, that argument must fail for reasons already discussed above: the law enunciated in the Florida Supreme Court's opinion is the law as it existed on election day and long before it. In fact, this argument is particularly flawed in the due process context. To establish the charge of a constitutionally impermissible retroactive change in the law, petitioners would have to demonstrate not simply that the Florida Supreme Court's decision constituted a

retrospective change and that the change deprived them of a cognizable liberty or property interest, but also that the change was "arbitrary and irrational." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); see also *id.* at 537 (plurality opinion of O'Connor, J.) (same); *id.* at 556 (Breyer, J., dissenting) (same). Petitioners cannot possibly meet this standard,[26] and the authorities on which they rely are wholly inapposite.[27]

The only due process right even arguably implicated by this case is the right of voters to have their ballots counted, a

[26] This Court's decisions reflect the strong presumption, consistent with this Court's understanding of the nature of the judicial act, that judicial rulings must be retrospectively applied to the parties themselves. See, *e.g.*, *Harper* v. *Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993); see *id.* at 107-08 (Scalia, J., concurring).

[27] *Roe* v. *Alabama*, 43 F.3d 574 (per curiam), and 68 F.3d 404 (CA11 1995) (per curiam), involved the claim of Alabama *voters* that the effectiveness of their votes would be diluted by the retroactive abrogation of a uniform, long-standing prohibition on accepting certain write-in ballots. Not only do petitioners lack standing to raise such a claim, but the Eleventh Circuit's holding rested on the fact that the change in Alabama law resulted in the counting of selected ballots that previously had been regarded as *illegal* in circumstances where voters who were *not* given the benefit of the new rule of eligibility could plausibly allege that they would have decided to vote had the onerous requirements lifted for others been lifted for them as well. Petitioners assert here the very different interest in precluding the counting of entirely *lawful* ballots, an interest that cannot possibly have constitutional footing.

Any reliance on *United States* v. *Mosley*, 238 U.S. 383 (1915), *United States* v. *Classic*, 313 U.S. 299 (1941), and *Lane* v. *Wilson*, 307 U.S. 268 (1939), would also be misplaced. All three decisions involve cases in which voters were deliberately and insidiously disenfranchised. *Mosley* and *Classic* were criminal cases that involved conspiracies to preclude votes in certain precincts from being counted and to count votes for a candidate as votes for his opponent. *Lane* was a challenge to a state statutory scheme that permanently disenfranchised a class of voters who failed to register to vote during a certain ten-day period. Unlike the cases cited by petitioners, the Florida statutory process seeks to enfranchise voters where machine marking and recording equipment may have worked a disenfranchisement of voters who cast legal ballots.

consideration that strongly supports the state supreme court's decision. It is worth noting in this respect that petitioners themselves have taken the view that military absentee votes should be counted even if the ballots in question did not comply with various clear requirements of Florida statutory law. We agree that voters have important rights to have their ballots counted, and the magnitude of those rights dwarfs any due process claim petitioners assert here.[28]

At bottom, all petitioners can really claim is that, in their view, the Florida Supreme Court got Florida law wrong. But a "'mere error of state law' is not a denial of due process." *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982); *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948) ("otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question"); *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 680 (1930) (Brandeis, J.) ("[T]he mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court"). To hold that the decision below violates due process would do violence both to principles of federalism and to the independence of the judiciary throughout the United States. It would invite an onslaught of such claims by the losing parties in state courts alleging that the decisions in their cases constituted an unconstitutional departure from "preexisting law." And it would undermine the authority of the judiciary to decide the meaning of law, by holding that apparently routine judicial acts of statutory construction long thought to involve only questions of state law in fact amount to illegitimate and unconstitutional usurpations of the legislative role.

[28] Even if this Court disagreed, the appropriate remedy for either an Equal Protection Clause or Due Process Clause violation would not be to cancel all recounts, but rather to order that the recounts be undertaken under a uniform standard. Counting *none* of the votes would be vote dilution with a vengeance.

CONCLUSION

The stay granted by this Court should be immediately dissolved, and the judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted.

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December 10, 2000

December 10, 2000
Brief of Katherine Harris for Stay to the United States Supreme Court

No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH, *ET AL.*,

Petitioners,

v.

ALBERT GORE, JR., *ET AL.*,

Respondents.

Brief on the Merits of Katherine Harris, Florida Secretary of State, Katherine Harris, Laurence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission

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I. Summary of the Argument

The Supreme Court of Florida created many new provisions in Florida's election laws on November 21, 2000, by applying common law and constitutional principles to change the opportunities for and method of conducting a manual recount, changing the dates for election certification, authorizing amendments to previously-filed certifications even after the statutory deadline had passed, removing much of the discretion granted to the Secretary of State to administer Florida's electoral system, and granting significantly expanded powers to local canvassing boards. *Palm Beach Canvassing Board v. Harris*, 2000 WL 1725434 (Fla. Nov. 21, 2000) ("*Harris* I"), at 3. This Court vacated that order and directed the Florida court to clarify its reasoning, which it has not yet done.

The decision below, the Florida court's second regarding the presidential election, while acknowledging the legislature's role, expands upon, and continues to give effect to, its first order and further encroaches upon the legislative scheme and the powers delegated by the legislature to the Department of State, the Division of Elections and the Elections Canvassing Commission. In particular, the decision (i) continues to allow manual recounting based on mere allegations of voter error, (ii) creates a new counting methodology, unknown in the legislative scheme, which allows vote tabulation equipment to be used to screen votes for manual counting, and (iii) creates what is in effect an absolute right to a manual recount whenever the number of ballots counted with no-

vote for an office exceed the margin of victory of one candidate. In addition, the court continued to apply, and actually expanded, the alternative certification deadline created in its previous order. As noted by Chief Justice Wells in his dissent, the decision of the Florida court "has no foundation in the law of Florida as it existed on November 7, 2000, or at any time prior to the issuance of [the decision below]." *Gore v. Harris*, 2000 WL 1800752 (Fla. Dec. 8, 2000) ("*Harris II")*, at 41 (Wells, C.J. dissenting).[1]

These actions by the Supreme Court of Florida do significant violence to the legislative scheme, in direct contravention of the exclusive grant of authority over presidential elections granted to state legislatures, makes *post hoc* changes to the Florida electoral system, and raises serious and far reaching concerns that would have been avoided by applying the Florida legislative scheme as written.

II. Statement of the Case and Procedural History

Both of the Florida Supreme Court's decisions *Harris I* and *Harris II* make substantial changes to Florida's Election Code, as it existed on November 7, 2000.

A. The November 21, 2000 Decision of the Florida Supreme Court (*Harris I)*

In *Harris I*, the Florida Supreme Court changed the election law of Florida as it existed on November 7 in several material respects:

[1] The text of this opinion can be found at Tab A to Petitioner Bush's Index of Exhibits.

- County canvassing boards *now* have the authority to amend certified returns filed within the statutory deadline for up to 12 days after the deadline for certification of the election results to accommodate manual recounting (i.e., the protest period was extended from 7 to 19 days);

- The Commission *now* must accept amended election returns filed after the statutory deadline so long as the filing does not violate the Florida Supreme Court's judicially-created alternative deadline of November 26, designed to accommodate manual recounting in this election;

- The Commission *now* is to ignore its statutory duty to certify election results based solely on the returns filed within the seven-day deadline set by the Legislature, so that late-filed amendments may be submitted to reflect manual recounts that extend beyond the deadline;

- County canvassing boards *now* enjoy broad discretion to order manual recounts in selected counties for a statewide election, even where the "error in vote tabulation" (i.e., the failure of the tabulation system) required under the statute has been found not to exist, irrespective of whether the recount will extend beyond the statutory deadline for filing election returns; and

- Where a uniform system of automated counting was previously in place, Florida's votes, including votes for the electoral college, will *now* be decided based on standards developed by individual canvassing boards in selected areas of the state.

From the outset of *Harris I*, the Florida Supreme Court made clear that "hyper-technical statutory requirements" must give way to the right of suffrage implicit in the Florida Constitution. *See id.* at *4 ("the will of the people, not hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases."); *Id.* at *6 ("all political power is inherent in the people"). After reviewing the relevant portions of the Florida Election Code, the court observed that:

> the County canvassing Boards are required to submit their returns to the Department by 5 p.m. of the seventh day following the election. *The statutes make no provision for exceptions following a manual recount.* If a Board fails to meet the deadline, the Secretary is not required to ignore the county's returns but rather is permitted to ignore the returns within the parameters of this statutory scheme. To determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount, it is necessary to examine the interplay between our statutory and constitutional law at both the state and federal levels.

Id. at *11 (emphasis added).

The court then looked to principles of Florida constitutional law and stated that the judiciary must "attend with special vigilance whenever the Declaration of Rights is in issue," and that "[t]he right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished." *Id.* at *12. In accordance with these general principles, the court held that "the Legislature may enact laws regulating the electoral process . . . only if they impose no

'unreasonable or unnecessary' restraints on the right of suffrage." *Id*.

Looking as well to the principles of Florida constitutional law for guidance, the court concluded:

> Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited. The Secretary may ignore such returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either such case, this drastic penalty must be both reasonable and necessary. But to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark. The constitution eschews punishment by proxy.

Id. at *15.

This Court subsequently granted Governor Bush's petition for certiorari review to address whether the Florida court's decision conflicted with federal constitutional and statutory law. *Bush v. Palm Beach Canvassing Board*, 2000 WL 1731262 (U.S. Nov. 24, 2000). On December 4, 2000, this Court issued an opinion in which it vacated the Florida Supreme Court's decision. *Bush v.*

Palm Beach County Canvassing Board, 2000 WL 1769093 at *4 (U.S. Dec. 4, 2000). In its decision, this Court asked the Florida Supreme Court to clarify its opinion concerning its impact on the legislature's power to select the method of appointing electors for President and Vice President of the United States in light of 3 U.S.C. § 5 or article II of the U.S. Constitution. *Id.* In so doing, the Court counseled:

> Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

Id. at *3. The Florida Supreme Court has not yet responded to this Court's mandate.

B. The Present Case (*Harris II)*

On November 27, 2000, Vice President Albert Gore, Jr. and Joseph I. Lieberman (the "Gore Respondents") filed an election contest under section 102.168(3)(c), Florida Statutes (2000), one day after the newly-created conclusion of the protest period. This section provides that an unsuccessful candidate may contest an election when there has been, among other things, a "rejection of a number of *legal votes* sufficient to change or place in doubt the result of the election." (Emphasis added.) After a two-day bench trial, the trial court denied the Gore Respondents any relief and entered a judgment in favor of the defendants. The Gore Respondents immediately appealed. The intermediate district court of appeals passed the case through to the Florida Supreme Court.

On review, the Florida Supreme Court reversed the trial court in part and ordered that partial manual recounts previously performed by the canvassing boards of Miami-Dade and Palm Beach counties be counted notwithstanding the fact that they were certified after the judicially-created deadline set in *Harris I*.[2] Moreover, the court ordered a statewide manual recount of the so-called "undervotes" in all counties where the undervote had not been subjected to a manual recount. *Id*. at 2. The court's decision is bottomed on a holding that "a legal vote is one in which there is a 'clear indication of the intent of the voter'" (*Id*. at 25), which is borrowed from section 101.5614(5). That provision deals with counting of damaged or defective ballots, which are not at issue here.[3]

III. Argument

[2] This, of course, conflicts with the court's prior ruling that all manual recounts *had to be* completed by 5 p.m. on November 26, 2000. Even assuming the validity of the extension of the protest period, these counties were not able to complete their manual recounts on time and, therefore, should not have been able to amend their certifications. *See* Fla. Stat. § 102.111 (2000).

[3] The proceedings in the trial court upon remand, and the trial court's order on remand entered before this Court's stay, are contained in Respondent's Appendix. The trial judge was constrained to a specific number of actions based upon the language of *Harris II*.

A. The Decision below and in *Harris I* Dramatically Changed the Purpose for Which Manual Recounts May Be Used.

The Supreme Court of Florida's decision is a further extension of its previous holding and reflects further developments in the Florida Election Code. As noted by Chief Justice Wells in his dissent below, there is no basis under the section 102.168 or any other provision of the Election Code for a manual recount, let alone a recount of only the so-called "undervotes," when there is no justification other than voter error.[4] The Gore Respondents cite no instance in Florida election history when a manual recount was conducted because of an allegation that the total number of undervotes was greater than the margin of victory.[5]

Section 102.168, Florida Statutes, imposes a burden on the contestant to show, among other things, that "*legal* votes sufficient in number to change or place in doubt the result of the election" were rejected. Fla. Stat. § 102.168(3)(c) (2000) (emphasis added).

[4] *See Harris II*, at 41 (Wells, C.J. dissenting) ("My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion.").

[5] The appellees cannot rely on *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998). There, the issue was not—as has been asserted—voter error, but rather whether "fraud," "gross negligence" or "incompetence" by election officials who re-marked ballots so that they could be counted by an electronic scanner should void an election. *Id.* at 723-24.

In this case, legal votes were not rejected. "Legal votes," as that term is used in section 102.168(3)(c), means votes properly executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places. By properly executing their ballots, voters can ensure that their vote will be counted by the tabulation machinery. Otherwise, these same voters risk having their vote disregarded. No other definition for "legal votes" fits the legislature's scheme.

The Division of Elections, charged with interpreting and enforcing the Florida Election Code, has opined that there is no basis in the legislature's scheme for a manual recount when there are no allegations other than voter error. Consistent with the statutory scheme for manual recounts, legislative history and prior interpretation of the statute, the Division issued a formal advisory opinion,[6] stating that:

> [a]n "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. The inability of a voting system to read an improperly marked marksense or improperly punched punchcard ballot is not an error in the vote tabulation. Unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of the sample precincts is caused by incorrect election

[6] Although this opinion was written in the context of an election protest, the basis of the opinion is equally applicable to an election contest.

> parameters or software errors, a county canvassing board is not authorized to manually recount ballots for the entire county, nor perform any action specified in Section 102.166(5)(a) and (b) of the Florida Statutes.

Harris I JA 57. Both the plain language and legislative history of Florida's election statutes indicate that the Division was correct: a manual recount of the ballots is proper only when there has been a failure of the vote tabulation system, i.e., the counting apparatus. Fla. Stat. §102.166(5) (2000).

The legislature has set out an elaborate system to ensure that all voters are educated on how to vote. In the weeks before the November 7, 2000, general election, each registered voter in the state was provided with a sample ballot and detailed instructions on how to vote according to the method used in his precinct. *Id.* § 101.46. For the instruction of voters on election day, each polling place is provided with instructions illustrating the manner of voting with the particular system in use. By law, before entering the voting booth, each voter is to be offered instruction in voting by use of the instruction model, and each voter is to be given "ample opportunity" to operate the model. *Id.* § 101.5611(a).

Additionally, a copy of the instructions was placed prominently in each voting booth. For those areas using punch cards, including Miami-Dade and Palm Beach counties, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. As is evident from the instructions used in Palm Beach County, the instructions were clear and complete. Harris Appendix to Response to Petition for Writ of Certiorari in Case No. 00-836.

The voter instructions were designed to prevent both undervoting and overvoting, and thus to ensure that each voter's choices were tabulated. To prevent undervoting, the instructions explained in oversize type that each voter must check his or her ballot card to make sure that the desired punched positions were fully perforated, and that no chad remained partially attached in the selected punch positions. The instructions included this specific action:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

Id.[7]

To prevent overvoting, the instructions directed voters to refrain from attempting to correct mistakes on ballots. Voters were told to instead obtain a new ballot, on which their selections could then be properly noted: "If you make a mistake, return your ballot card and obtain another." *Id*. Any voter following this direction would have cast only one vote for each office and his or her ballot would have been at no risk of invalidation based on overvoting.

In case any voter, after entering the voting both, asks for instructions about how to vote, two election officers who are not members of the same political party shall assist and give

[7] At no time, although frequently urged upon it, has the Florida Supreme Court made any comment upon these instructions and how they might impact the issue of voter intent.

instructions, then leaving the voter to vote in secret. *Id.* § 101.46. The fact that this assistance is available is made clear in the "NOTICE, Instructions to Voters" that are posted at all precincts. Moreover, all inspectors, clerks, and deputy sheriffs are given training classes for the purpose of instructing such persons in their duties and responsibilities as election officials. *Id.* § 102.012(8). In addition, sample ballots are furnished to each polling place as are a number of reduced-size ballots that are made available to any voter so requesting. *Id.* § 101.20.

When voters followed these instructions, the automatic tabulation system accurately tabulated the ballots. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices would have been affected by the manual recount at issue.

Plainly stated, the type of manual recount allowed—indeed, required by the Florida Supreme Court—does not address the failure of automated equipment to tabulate properly executed ballots, the only purpose for which manual recounts were allowed under Florida law as it existed on election day. The sole purpose of the recount mandated by the Florida Supreme Court is to allocate additional votes to certain candidates based on those ballots that voters failed to execute properly even after receiving clear instructions. To accomplish this result, small armies of local government employees are left to divine, without clear standards to guide them, the intent of electors who failed to clearly mark their ballots. Florida law in no way compels such a result. *See Fladell v. Palm Beach Canvassing Board*, 2000 WL 1763142 (Fla. Dec. 1, 2000) (rejecting challenge to Palm Beach County's so-called "Butterfly Ballot"); *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("Mere confusion does not amount to an

impediment to the voters' free choice if reasonable time and study will sort it out.").

There can be no doubt that the Florida Supreme Court's decision creates new rights and obligations. *See Harris II* at 55 (Wells, C.J., dissenting) ("Clearly, in a presidential election, the Legislature has not authorized the courts of Florida to order partial recounts, either in a limited number of counties or statewide. This Court's order to do so appears to me to be in conflict with the United States Supreme Court decision."). Again, the legislature was well within its right to set forth a scheme whereby voters that followed the proper procedure were deemed to have cast legal votes. *U.S. Const. art. II, § I.* Those who did not follow instructions ran the risk that their vote would not be counted. It is critical to note that the no votes at issue here include ballots that contain chads that for one reason or another were never fully dislodged. Under the Election Code, these votes are not legal votes. Moreover, there was absolutely no evidence that the ballots were damaged.

Another indication that manual recounts are not available for voter error is found in section 101.5606, Florida Statutes (2000). This section requires that all electronic or electromechanical voting systems used must be capable of correctly counting votes. If the Florida Supreme Court is correct in its broad definition of a legal vote, then there can no longer be any voting machines because those machines will never be capable of counting all the votes. The Florida Supreme Court's opinion relegates the voting machines to a screening device used to locate undervotes and is thus anathema to this section, among others, of the Code.

A simple reading of the Florida Supreme Court's decision, especially under the light of Chief Justice Wells' powerful and

persuasive dissent, can lead to only three conclusions: (1) the Florida Supreme Court made new law when it ordered a manual recount based on unsubstantiated allegations of voter error; (2) the court made new law by requiring that only the "undervotes" be counted, instead of *all* ballots; and (3) the court made new law by requiring a manual recount whenever the number of undervotes exceeded the margin of victory.[8]

B. Although the Court below Created New and Unprecedented Rights to Manual Ballot Counts, it Created No Standards by Which Such Counts Are to Be Conducted.

Because the Florida legislature never authorized manual recounts to correct voter error, it has enacted no standards by which to judge improperly executed machine ballots. The utter lack of objective standards in the partial manual recount ordered by the court below will inevitably lead to a chaotic counting process with different counting methodologies being applied in different areas of the state:

> [T]he majority returns this case to the circuit court for a recount with no standards. I do not, and neither will

[8] In fact, that is what the court held. *Id.* at 23 ("Here, there has been an undisputed showing of the existence of some 9,000 'under votes' in an election contest decided by a margin measured in the hundreds. Thus, a threshold contest showing that the result of an election has been placed in doubt, warranting a manual count of all undervotes or 'no vote registered' ballots, has been made."). That is not what the statute says; this a new rule enunciated by the Florida Supreme Court to facilitate selective recounting.

> the trial court, know whether to count or not count ballots on the criteria used by the canvassing boards, what those criteria are, or to do so on the basis of standards divined by [the trial judge]. . . . It only stands to reason that many times a reading of a ballot by a human will be subjective, and the intent gleaned from that ballot is only in the mind of the beholder. This subjective counting is only compounded where no standards exist or, as in this statewide contest, where there are no statewide standards. . . .

Harris II at 56-57 (Wells, C.J., dissenting).

Other states that (unlike Florida) provide broad manual recount rights for correction of voter error also generally provide standards by which to judge the ballots. For example, Indiana provides clear and definitive standards for manual counts of erroneous ballots, requiring ballots with pierced or partially detached chads to be counted and ballots with mere indentations to be considered as having no vote. *See* Ind. Code Ann. § 3-12-1-9.5 (West 2000). The fact that Florida has no similar objective standards underscores that the Florida Legislature did not intend manual recounts to be used to correct voter error.[9] Many states,

[9] The only other conclusion would be that the legislature chose to enact a system that is so fraught with subjectivity that it denies due process and equal protection. A system that allows votes to be evaluated differently based on where the voter resides cannot stand. *See Reynolds v. Sims*, 377 U.S. 533, 563 (1964) ("Weighing the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids sophisticated as well as simplified modes of

like Florida, use manual recounts solely to confirm machine calibration or correct machine failure.[10] Additionally, states with

discrimination.").

[10] *See, e.g.*, Col. Rev. Stat. 10-10.5-102 (West 2000) ("Prior to any recount, the canvass board shall choose a precinct at random and a test number of ballots on which to conduct a machine count and a hand count of ballots. The precinct chosen shall have at least fifty ballots for the count. If the results of the machine count and the hand count are identical, then the recount shall be conducted in the same manner as the original ballot count."); Iowa Code Ann. § 50.48 (West 2000) ("If an electronic tabulating system was used to count the ballots, the recount board may request the commissioner to retabulate the ballots using the electronic tabulating system. The same program used for tabulating the votes on election day shall be used at the recount unless the program is believed or known to be flawed"); Neb. Rev. Stat. § 32-119 (West 2000) ("The procedures for the recounting of ballots shall be the same as those used for the counting of ballots on election day. . . . Counties counting ballots by using a vote counting device shall first recount the ballots by use of the device. If substantial changes are found, the ballots shall then be manually counted in any precinct which might reflect a substantial change."); W. Va. Code § 3-4A-28 (West 2000) ("[Ballots . ..] shall be reexamined . . . in the same manner . . . utilized in the original vote count During . . . any requested recount, at least five percent of the precincts shall be chosen at random and the ballot cards cast therein counted manually. The same random selection shall also be counted by the automatic tabulating equipment. If the variance between the random manual recount and the automatic tabulating equipment count of the same random ballots, is equal to or greater than one percent, then a manual recount of all ballot cards shall be

liberal manual recount rights, unlike Florida, almost invariably provide detailed standards by which to conduct those recounts.[11]

Prior to the decision below and the *Harris I* decision, votes in Florida were counted according to an objective system based on approved and calibrated tabulation equipment.[12] Under this system, voters are required to indicate their votes in such a way that properly functioning tabulating equipment will register the vote. For this reason, voters were instructed to carefully check their ballots for mistakes, as exemplified in the instructions used in Palm Beach County and quoted *supra*. When voters followed these instructions, the tabulation equipment accurately tabulated the ballots according to their accepted operational parameters. Only the ballots of those voters who, by their own actions, failed to

required.").

[11] *See, e.g.*, Cal. Elec. Code §§ 15628-15631(West 2000) (detailing exact procedures for manual recounts); Ind. Code Ann. § 3-12-1-9.5 (West 2000) (detailing exact standards for "chad irregularities"; Tex. Elec. Code Ann. § 127.130 (West 2000) (detailing exact procedures for manual Counting, including "chad" standards).

[12] This automated equipment is regulated to ensure that a standardized result occurs for all properly cast ballots. *See* Fla. Stat. § 101.015. The Secretary has implemented this statute through administrative rules that regulate the performance of tabulating machines and designate a defined maximum error rate. *See* Fla. Admin. Code. R. 1S-2.015.

clearly indicate their elective choices would have been affected by the manual recounts at issue below.

Thus, the use of automated tabulation according to uniform performance standards for the tabulation equipment provided both uniformity and objectivity. Moreover, the equipment is accurate so long as ballots are properly executed. For these reasons, the Florida legislature chose to rely principally on automated equipment, with manual recounts being one of a series of remedies to be employed only when the equipment fails to operate as intended.

The decision below throws out the standardized system created by the legislature in favor of undisciplined and result-selective manual counting for the sake of divining the intent of improperly executed ballots. The only "standard" by which this is to be guided is found in Florida Statutes section 101.5614, which provides that a "damaged or defective ballot" may not be discarded "if there is a clear indication of the intention of the voter as determined by the [county] canvassing board."[13] With nothing more than this vague concept to guide the counting, the court below would have a trial judge enlist hundreds of independent counters throughout the state to recount the votes. Yet, there will be no objective standards for these persons to apply during the counting process. The practical effect of the decision below will be that numerous teams of counters will exercise vast unchecked

[13] The ballots that were ordered recounted are not damaged or defective. The failure to count these ballots stems from the failure of voters to execute the ballots as instructed, not from defects in the ballots themselves. Thus, the cited statute has no application to the ballots at issue. *Harris II*, Slip. Op. at 52 (Wells, C.J. dissenting).

discretion to review improperly executed ballots, and will create *ad hoc* standards for judging those ballots.

Moreover, the partial nature of the recount forces the vote tabulation equipment to be used as, essentially, a screening device to find undervotes.[14] The equipment was not designed for this function. The type of counting the court below directed would require special software to be installed in the tabulation machines. And, because of the short time frame involved, there would be no time for the machines and their software to be evaluated for accuracy by the Division of Election as required by section 101.015 and its implementing regulations. Thus, if the decision below were to stand, the voting machines would be used for a purpose that has no basis in the legislative scheme and the resulting recount would be of questionable accuracy as it is impossible to know whether the machines would be accurate in their selection of undervotes for counting.

In his dissent below, Chief Justice Wells correctly recognized that (i) section 101.5614, the statute cited as the appropriate "standard" for manual recounts, was never intended by the Florida legislature to apply to a recount of improperly executed ballots intended to correct for voter error and (ii) the lack of any

[14] This partial counting approach results in a different counting method applying to 64 predominantly Republican counties vis a vis the heavily populated and overwhelmingly Democratic Broward and Palm Beach Counties, which underwent *full* manual recounts. It also creates voter differentiation within Florida's largest county, Miami-Dade, where 139 heavily Democratic precincts underwent full manual recounts while the remaining 635 largely Republican precincts were to only have manual recounts of undervotes.

objective criteria by which to conduct the recount raises serious federal concerns:

> The majority quotes section 101.5614(5) for the proposition of settling how a county canvassing board should count a vote. The majority states that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." § 101.5614(5), Fla. Stat. (2000). Section 101.5614(5), however, is a statute that authorizes the creation of a duplicate ballot where a "ballot card . . . is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment." There is no basis in this record that suggests that the approximately 9000 ballots from Miami-Dade County were damaged or defective.
>
> Laying aside this problem and assuming the majority is correct that section 101.5614(5) correctly annunciates the standard by which a county canvassing board should judge a questionable ballot, section 101.5614(5) utterly fails to provide any meaningful standard. There is no doubt that every vote should be counted where there is a "clear indication of the intent of the voter." The problem is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a "dimpled chad" where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is

> fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.

Harris II at 51-52 (Wells, C.J. dissenting).

C. The *Harris II* Decision Further Modifies the Legislative Scheme Meant to Ensure Timely Election Results.

The *Harris II* decision has further modified the statutory election certification scheme. The Florida Supreme Court expanded the extension on the seven-day statutory deadline imposed by sections 102.111 and 102.112, Florida Statutes, that it had granted in *Harris I*. Though the Florida Supreme Court held in *Harris I* that the seven-day deadline should be extended to 19 days in Presidential elections (and presumably longer in local elections), the *Harris II* court held that results received after the statutory and *Harris I* deadline had to be included in the Election Canvassing Commission's certification. The ramifications of this continuing duty to re-certify election results is directly counter to section 102.111, Florida Statutes,[15] and the legislative desire to ensure a timely resolution of election disputes.

Additionally, the *Harris II* decision modified the then existing rule in Florida that county canvassing boards are responsible for determining the number of votes cast for each candidate, Fla. Stat. § 102.141 (2000), and once a canvassing board certifies results, those

[15]That section reads, in pertinent part, that "[i]f the county returns are not received by 5 p.m. of the seventh day following the election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified." Fla. Stat. § 102.111 (2000).

results are presumed to be correct. *See, e.g., Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1976) ("[E]lected officials are presumed to perform their duties in a proper and lawful manner [Accordingly] returns certified by election officials are presumed to be correct.").

D. The Proceedings On Remand Demonstrate the Serious Flaws in Harris II's Demands

The most cursory review of the proceedings in the Leon County Circuit Court that followed the remand in *Harris II (R.A. 1 - ___)*, demonstrate the number of changes in the law, lack of standards, and deviations from Florida law in existence on November 7, 2000. Despite extensive objections by both the Secretary and the co-respondents, as well as the Bush petitioners, the Circuit Judge was unable to do more than simply follow the Florida Supreme Court's directions. *(R.A. 1- ___)*. Thus, with just hours' notice, more than 60 canvassing boards were assembled and instructed to begin counting only ballots with undervotes for President, with some counties having manually counted all votes, some counties having manually counted some votes, and some counties having manually counted no-votes. In addition, no counts were made of all of the votes, nor were counts made of over-votes. *Harris II* ordered the inclusion of partial returns from some counties, as well as some returns, like Palm Beach County's that had never been certified at all, as well as ordering Miami-Dade County votes to be "counted" in Leon County by the Supervisor of Elections or such other personnel ordered by the circuit judge. Unable to allow legal arguments and challenges because of time constraints, the circuit court allowed the filing of written objections to the proceedings. (Respondents' 31 objections are set forth in R.A. __ - __).

In short, until the entry of this Court's stay of Saturday, December 9, everybody was counting everywhere, under whatever

standards they established, without regard to any statutorily-defined criteria.

IV. Conclusion

The Gore Respondents will argue that the decision below is garden-variety statutory construction. The order below, though couched in terms of statutory construction, is actually a significant departure from the pre-election legislative scheme. When "judicial construction of a statute is unexpected and indefensible by reference to the law which had been expressed," it constitutes a change in the law. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). The changes outlined above have no basis in the legislative enactments and constitute such a change.

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IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA.

CASE NO.00-2808

ALBERT GORE, JR., et al.,

Plaintiffs,

vs.

KATHERINE HARRIS, as Secretary of State,
STATE OF FLORIDA, et al.,

Defendants.

_____X

IN RE: Motions Hearing

BEFORE:HONORABLE TERRY LEWIS
Circuit Court Judge

DATE: Friday, December 9, 2000

TIME: Commenced:8:35 p.m.
Concluded: 11:39 p.m.

LOCATION: Leon County Courthouse
Courtroom 3D
Tallahassee, Florida

REPORTED BY: B. J. QUINN, RPR, CMR, CP
Certified Realtime Reporter
Notary Public in and for the
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PROCEEDINGS
(REPORTING STARTED AFTER HEARING COMMENCED.)
THE COURT: What's your Plan B?
MR. BECK: I think it would be good to reflect this over the evening, because I know you're going to need a Plan B, and I don't think you need to decide that tonight. What you need to decide tonight, is that people in the counties shouldn't be segregated in the ballots, in the way that makes our life more difficult.
In terms of what needs to be counted, we think that, first of all, the Supreme Court opinion sometimes talks about undervotes.
And by our count, through -- in the most recent machine run statewide, there are 64,780 undervotes.
Those are votes, those are ballots, where nobody punched through the chad for any presidential candidate. The Supreme Court elsewhere talks about counting all the nonvotes.
The nonvotes is a broader category. That also includes the ballots where people punched through for two candidates. There's 175,660 of those nonvotes. So we have to sort that through.
We think, also, that it is --
THE COURT: What does the Supreme Court say that I should do about nonvotes?

MR. BECK: I haven't been able to figure that out, frankly, Your Honor. I just know they refer to nonvotes on page 39. And nonvotes, to those who sat through the trial, is a broader category. And those may have to be examined, as well, to see if you can discern voter intent from the nonvotes.

There are also, we have said in this litigation, if you're going to start counting dimples as votes, then perhaps you need to look at all the ballots, because if somebody punched through successfully for George Bush, but then dimpled one for Al Gore, then if that dimple counts as a vote on the other ballots, it ought to count as a vote on all the other ballots, and that would create an overvote situation. So there's that problem, as well.

But focusing now on the undervotes, we think that you need to look at all of the undervotes in Miami-Dade County, including the 20 percent that were already looked at by the Canvassing Board. And the reason for that, Your Honor, is that it now becomes a judicial function to make sure that they are all treated under the same standard using the same factors.

We have a real serious problem in Miami-Dade County, where we had a Canvassing Board that applied a very, very loose approach of divining voter intent.

And they only went through 20 percent of the precincts,

and the 20 percent of the precincts happened to be overwhelmingly Democratic. That's just the sequence they did them in. Now, and they came up with a number of votes that they divined, and Al he Gore picked up a whole bunch of votes.

And, now, unless Your Honor looks at that, again, we're going to start looking at the other 80 percent. And someone is going to be using a different approach that was used for the 20 percent that's heavily Democratic.

The remaning 80 percent, according to the regular votes that came in was actually 52 percent Bush, 48 percent Gore.

So if someone was going to use a real meaningful standard for the Republican parts of that county, then those voters, including a lot of Hispanic voters, who tended to vote Republican in this last election, are going to have their votes evaluated under a standard that's different than was used for the Democrats.

That creates big problems under the Voting Rights Act for a protected group, like Hispanic Americans, the equal protection clause for everybody, as well as 3 US Code Section (5).

So we believe that the Court is required to include that 20 percent of the Miami votes so that all the votes are counted in the same way.

We also believe that Broward, which underwent a manual

recount, those votes also need to be examined by whoever the Court determines should do the examining, using the factors that the Court identifies as appropriate.

What we had in Broward was testimony in this record that they used different standards at different times during the manual counts, and that the standards were much, much looser than, say, the ones that were attempted to be applied in Palm Beach.

So Broward was a very heavily Democratic county, voted heavily for Al Gore. It picks up hundreds of votes in this process in the Canvassing Board, and uses a standard that was not used in Palm Beach, which I believe is not going to be the one that Your Honor sets for the rest of the state.

So we think that the Broward votes have to be reevaluated, using the same factors that Your Honor, we think, will have to be identifying for the rest of the state. Otherwise we've got the same problems identified before. Different people's votes are treated differently, depending on where they live. And whether their Canvassing Board is all Democrats or has a mix.

So it's my big concern about consistent standards. And then, also, Judge, less controversially, I believe, we got a ruling today from Pensacola concerning Overseas ballots, the Military ballots, that the Democrats had initially succeeded in including. And now the Overseas and Military people

should have their votes counted even though they don't have a postmark on the ballot. We'll be giving Your Honor a copy of the opinion.

I haven't seen it, yet, but I understand it was favorable to the overseas voters. So those votes will have to be included in the tally, as well.

We believe that as to where it should be counted, consistent with our position, that the Court should be doing the counting, or at least under the direct supervision of Your Honor, if you're going to use personnel here, that the votes ought to be shipped up here.

We also believe, lastly, on the procedures that, the counting ought to be done in the Sunshine, with observers from each side present. These are going to be factual determinations that are going to be made by somebody under the auspices of the Court. And there are go to be disputes like there were in front of the Canvassing Boards, over whether this stray mark is a vote for Al Gore, or whether it isn't a vote for Al Gore, and we're going to have to be heard on that. So we're going to have to have some mechanism, where we can have observers present, both sides, obviously.

And we believe that, under Florida law, since this is, essentially, a taking of evidence and an examination of evidence in Court, that needs to be done in the Sunshine.

Now, Your Honor --

THE COURT: Tell me some specifics on that. How many people? What would they do?
MR. BECK: I guess, Your Honor, I don't know, yet, what Your Honor is going to order in terms of who is going to be counting these votes. But I think we basically need to have, for each person or group of people who are counting a set of ballots.
I think we need one observer from each side, who has the opportunity to be heard. And we need this transcribed so that, ballot by ballot, if there are disputes, those can be resolved.
It may be that Your Honor, takes an approach of allowing others to do the first cut. And then disputed ballots, you'll examine yourself.
But if you're going to do that, I think we're going to need a record so that Your Honor can name this evaluation. And even if Your Honor, decides: I'm not going to look at any ballots, we still need a record, because we're still entitled to appeal.
And I don't think that the Supreme Court created a whole new mechanism where not only do we have new people doing a manual recount, but it's conclusive that we're not allowed, even though it's done in the course of a lawsuit, to ever have an appeal or that.
So we're going to need to have court reporters

transcribing objections and arguments and records being kept, of which ballots are in dispute. So you can resolved that, or some other judge, or some other Court, can resolve it.

On the question of standards, Your Honor, I guess what I'll do, since I don't know exactly how comprehensive Your Honor's order is going to be tonight I'd like to give you a preview of what our position is, with the caveat that, since we didn't know Judge Sauls was going to be recusing himself, I didn't come ready with a two-hour evidentiary presentation. But let me tell you what I think the evidence showed in this case concerning standards.

THE COURT: I want to hear from Mr. Douglass and you. And it's ten of nine. And I may want to come back and hear some evidence on it, but, really, based upon what you heard, and the evidence, what criteria should be applied, in your mind?

MR. BECK: That's what I'll say, without getting into the evidentiary discussion. I apologize, but we have to say that, both from a legal point of view as well as a factual point of view, we think the criteria are: If you successfully punch the chad through all the way, or if you dislodge the chad partially. So that it's what is so-called a hanging chad. I trust Your Honor has sort of seen enough in the newspapers to know what a hanging chad is.

THE COURT: Yes, sir.

MR. BECK: But that is a fair indication of voter intent. We think the standard ought to be that a dimple or indentation is not something from which you can discern voter intent. Now, Judge, I want to go to the next step, to Plan B.

If Your Honor decides that you're going to articulate a standard, whether people are going to take into account dimples and indentations, here is what I think the factors are: Number one, the indentation has to come in a stylus, not from a fingernail or a finger.

And believe it or not, we had evidence, Your Honor, you can tell when it comes from a stylus, and when it's just other some stray marking. When it comes from a stylus, it leaves, basically a fingerprint of a stylus. There will be a circular dimple that is the same diameter of the stylus, and you can tell.

So, number one, the only dimples that ought to even be considered, is if they come from a stylus.

Number two is, the stray or so-called rogue dimple; that is, where there's a dimple next to George Bush's name, or Al Gore's name, but the voter managed to successfully vote in the rest of the races, that that is not an indication of voter intent. And it is, in fact, at least as consistent and more consistent with the hypothesis that the voter chose to affirmatively not to vote for Al Gore or George Bush.

We only heard from one voter. He put his stylus in, he thought about it, searched his soul and brought it out. So that's a man who chose not to vote. If you count that as a vote, you disenfranchise that man.

He's got a right not to vote for either one, we all love our candidates. But I read in the paper there are a lot of people who are not as crazy about either one of them, so they chose not to vote.

So a stray or rogue dimple is not a vote. And that simply is pretty consistently the rule throughout the country. And I hope tomorrow to have an opportunity to present you with the law, as well as the facts on this.

Now, we also did hear evidence from our expert, as well as theirs that, occasionally what happens is people don't insert the ballot in what's called a throat. Instead they put it on top of the device, and then they are never able to punch the chads through.

But both experts said, in that event, you'll see a pattern of dimpled chads. Because there's nothing magic about Al Gore, all the way down the ballot they will have failed to punch the chad through, or in almost all of the races.

So we believe that if you're going to be looking at dimples, which you should not do, that you should only count the dimples where there is a pattern of clear attempts, but

failures to punch the chad through.
That is the kind of standard that was attempted to be applied in Palm Beach County to varying degrees of success at different times. It's the kind of standard that was applied in the Illinois case, and in the Pullen case, and it's also the kind of standard embodied in some regulations from around the country.
We think dimples shouldn't count. But if you're going to count them, that's a fair indication of voter intent, that the rogue dimples ought not to be counted.
And one thing we feel very strongly about, Your Honor, what happened in Broward County was just awful. They said: This person voted for a whole bunch of Democrats; and, therefore, I can read his mind and tell that indentation next to "Al Gore" was really a vote for Al Gore.
We feel like trying to read his mind based on what he did in other races is really improper. Because at the presidential race, in particular, people decide not to vote for the head of the ticket or they switch parties, or cross other parties, because they often vote for the man, and the future of the woman, rather than the party. And they have second thoughts, and they often say: I'm a loyal Democrat, but I can't stomach Al Gore. Or, I'm a local Republican, but don't like George Bush. But when you describe intent based on what they did in other races, you disenfranchise those

people and water down all the votes of other people in Florida.

So that's my shorthand version of what we think the factors would be. And we hope Your Honor would give us an opportunity to summarize the evidence on it, because there was quite a lot of evidence in the trial record on this.

THE COURT: When do you envision in your procedure that actual counts would begin?

MR. BECK: Well, I think that they ought to begin -- I assume Your Honor wants to move forward expeditiously and not on a leisurely basis. So I think people ought to be working on the weekends here, and I think that the counties ought to be reporting to the Court on their success in segregating the undervotes, and ought to be reporting to the Court the numbers, so that we have it in the record here of the new tabulation, whatever this may be used for in the future, of Gore votes, Bush votes, all the other candidates, and the number of undervotes.

And then once those are segregated, you know, when it should begin, I'm assuming Your Honor is not going to take me up on my suggestion that they all get shipped down to your courtroom and you look at them all.

So I think, then, we're talking about, you know, the day after that.

But I don't know who Your Honor is going to decide

should look at these votes.
THE COURT: Whoever, that is.
MR. BECK: Whoever looks at them, I think ought to be looking at them. Basically, as soon as the Court is satisfied they've segregated these in a proper way and recorded the tabulations in a proper way, and as soon as we can get a court reporter and observers from either side there.
So I'm anticipating that some counties may be able to do that process, and conceivably start, you know, tomorrow afternoon. I don't know if they can get it done that fast or not.
We also have a whole issue of -- I think the Supreme Court ordered that every county, including the ones that use optical scanners, have to go through this process:
And I'll tell you, I haven't given a moment's thought to what an undervote is, what the implication is in an optical scanning county.
We need to talk to the Court about that. There are some counties with very view undervotes. And it may be an easier task. So the short answer is: As soon as Your Honor has been satisfied that they've been properly segregated and tabulated, and we can get observers there, then I think the counting would begin.
Now, let me also say that we actually intend to seek a

stay of this entire matter from the Florida Supreme Court and the United States Supreme Court, because I think that it can't possibly result in anything that's actually meaningful and helpful. And all it's go to do is create constitutional difficulty.

So, but in the meantime, we want to be cooperative with the Supreme Court. So that's what I think ought to be done.

We're just now thinking about who are we going to draft to be observers. I don't know whether it's true. My wife told me that she was watching television before I came over here, and that she heard that the Democrats had chartered a plane and were flying in 100 lawyers from Washington to act as observers.

So I suppose we'll have to round up volunteers on our side. I don't have a toll free number to call. But we're going to have to get volunteers on our side, as well, lawyers who are going to be with each one of these counters, lodging objections and making arguments.

THE COURT: Anything else?

MR. BECK: No, Your Honor.

MR. KLOCK: Your Honor, we have objections to what the Republicans are suggesting.

THE COURT: The Republicans are suggesting -- I'd like the objections, but I'd rather focus on the positive. You tell me what you want to do.

MR. KLOCK: If I can explain why. I don't mean to be mean or problematical. But you have the desirable position of not only reporting to the Supreme Court of Florida, but also having the Eleventh Circuit Court of Appeals and the United States Supreme Court watching what is going on, having orders simultaneously filed in Washington and Atlanta.

Our concern is to preserve the record for a review before the Eleventh Circuit Court of Appeals and also the United States Supreme Court.

And, Your Honor, I'll understand if you don't want to hear it, and we'll just file it in writing. But one thing I'd like to start out with that's problematical, if you turn to page 38 of the slip of the Supreme Court, they say: "Moreover, because the venue of an election contest that covers more than county, lies in Leon County, the Circuit Court has jurisdiction, as part of the relief it ordered," presumably, "to order the Supervisor of Elections and the Canvassing Boards, as well as the other necessary public officials in all counties that have not conducted a manual recount or tabulation of the undervotes in this election, to do so forthwith. Said tabulation is to take place in the individual counties where the ballots are located." That's what they ordered you to do.

You'll recall the argument put forth before that indicated that the only provision for a manual recount

provides for three people that are designated by office. And, Your Honor, the identity of those people are very important, because, for instance, in Dade County, the supervisor of elections, who is one of the three, is a registered Independent.

If you look down here further, after the Supreme Court has said that you're supposed to do it in the county where the votes were cast, they then go on, on page 39, to suggest that, because time is of the essence, the Circuit Court with respect to the Miami-Dade ballots is to go forward and be assisted by the Leon County Supervisor of Elections, or its sworn designees, directly contradictory to the paragraph before. And it's my understanding -- I've never met the man -- that he is an elected official who ran as a Democrat.

Now, Your Honor, if you look at the transcript when you have the opportunity to look through, you'll find that the number of votes that are generated through this divining process seems to be tied not only to the number of registered voters of each party in the county, but also who is looking at it.

So our view would be, and we would reiterate and respectfully disagree with our colleagues that are representing the Republicans, that it must be done by the Canvassing Boards, the standards have to be established by the Canvassing Boards there.

And if the Court is going to overlook that, that's fine. But it can't be done the way that it's being suggested that it be done. That would be improper with the statutes. Now, we have a number of objections I'd be happy to go into, but --

THE COURT: The positive thing that you suggest I do is have the Canvassing Boards in the county do the manual recount?

MR. KLOK: Yes, Your Honor.

THE COURT: Okay.

MR. KLOCK: And then, Your Honor, also with respect to, you know, certain other points that we can raise, we can do it now or later. But the Secretary -- the Division of Elections has issued two advisories to the supervisors. And I'll pass one up to the Court, if I may, and pass one around here, with the Court's approval.

And, Your Honor, what our hope is, is we have advised the supervisor of elections they should watch TV so if there is anything that is ordered from the bench, that it can be immediately implemented.

But, Your Honor there is going to have to be a need to deal with those issues. I assume these people are going to comply without being served. But you never know. And that's something that the Court has to consider, as well.

Another point the Court has to consider is that, you

know, this process has now extended -- the protest/contest period, which apparently ran together -- for a longer period of time. And when, Judge, is to be the appellate review of this process if everything has to be done by midnight on the 12th?

So Your Honor also has to give some thought to a cutoff point. And as has been argued before also under the statutes, if you don't have a complete count done, it is not fair to include them.

And, Your Honor, I would, again, refer black to the testimony that was taken at the trial, where they demonstrated in Miami-Dade County, where the numbering of the precincts starts with one, not surprisingly, starts over by the coast, that heavily Democratic precincts with over an 80 percent Democratic content were counted in the first 135 that they did where they stopped, and then the rest of the county went 53 percent, as opposed to a higher number, I believe 53 percent for Governor Bush.

So, consequently, if you don't do the entire county, again, you're skewing the votes. So you do have to respectfully figure out a way to have all of these people in all of these counties get everything done. So it's either everything or nothing. And we'd also suggest that the whole state has to be done, or they can't be permitted. There is a statutory provision that says you can't have partial

recounts.
THE COURT: When you say, "all the votes," are you talking about all of the votes, or all of the undervotes?
MR. KLOCK: Our position is all of the votes, that's plan A, which Your Honor has indicated you don't have a great deal of affection for.
THE COURT: Plan A was that I personally look at everything.
MR. KLOK: This was a modified plan A. This is more attractive. But the fact is, again, all the votes have to be looked at, because the overvotes are just as significant as the undervotes, because as you go through the process, if the chads flip this way, they can flip that way.
THE COURT: I'm going by a very narrow thing, and what the Supreme Court told me to do is what would be done.
MR. KLOCK: I'll be happy to put all of our objections in writing, I just don't want the Court to claim its sandbagged later on if these objections are raised.
Finally, with respect to the standard, with respect to what Mr. Beck raised, the only testimony -- they had an expert that the Democrats put on. He was asked the following several questions. He was asked: If you pick up a ballot and you go to the presidential race, and you see a hole punched through all the way, and you see a dimple below it, and another candidate, how do you read that? And he said,

well, there's no question. The dimple is a mistake, and the punch-through is correct.

The next question: Well, if you pick up a ballot, and there is only a dimple, and he said: Well, if it's only a dimple, you count that as a vote.

Now, how Your Honor, something that is a mistake in one instance, then becomes not a mistake in another instance, I think points to the fact that anything having to do with a dimple should be immediately suspect, especially since we don't have any standards.

And I don't understand how you can have a standard if something is or is not a mistake or a vote, depending on what you want to do, which gets us back, again, Your Honor, to the Canvassing Boards that have to make these determinations. I guess with some sort of Court supervision.

And if Your Honor wants, we'll put other objections into writing and file them in the morning. We want them in the record, and we want Your Honor to be able to look at them.

And, in addition, I would ask, with respect to what one of the appellate courts is looking at, that is the Eleventh Circuit Court of Appeals, we want to pass up a copy of the Touchtone decision, and its dissent. And particularly call Your Honor's attention to the dissent of Judge Cholak (phonetic) for Your Honor to look at.

I had asked for copies of each of the opinions to be brough over, and, apparently they brought over twice as many of one.

I'll also hand up the Seagull opinion. And the other objections, we'll file in writing.

THE COURT: And I appreciate that many of you may have objections to what needs to be done. My only concern is I'm going to try to do what's been directed. I fully expect you to make your objections on the record.

But if we have to of the this done, what's the best way to do it?

Finally, also, I was just handed this. This is an order of the United States District Judge for the Northern District of Florida which commands that Military ballots that are, as the language says -- if I can read this from the ordering clause: "Accordingly the Court hereby orders any state statute, regulation administrative rule, or procedure, that rejects a federal write-in ballot which has been signed pursuant to the oath provided therein, (a), solely because the ballot envelope does not have an APO, FPO or foreign, postmark; or, (b), solely because there was no need for an application for a state absentee ballot, conflicts with federal law. It is further odered that all federal write-in ballots objected to for the above-stated reasons, are declared valid, this 8th day of December, 2000, by Judge

Leahy Collier (phonetic), United States District Court, which, of course, is binding upon the Secretary of the Canvassing Commission. So we'll be in that process, as well, Your Honor.

MR. BECK: Your Honor, there were a couple of points that I either didn't make, or didn't make clear, but I'll at least make them short.

The first one is that on the question of whether there was a statewide standard as to not counting dimples and indentations, there was, we believe, a statewide standard in practice, in effect, which was to count, fully dislodged chads, only, and that the Palm Beach regulation was a recognition of that.

It's not so much that the Palm Beach regulation governs statewide, but it is a reflection of the fact that, statewide, that was the practice and standard.

So if this Court now articulates a standard that allows dimples and indentations to be counted, that will be a new and different approach and standard than was in place in the Court -- in the state, although not written up in the state regulations; and, therefore, would violate 3 US Code Section 5.

THE COURT: When you say at statewide standard, where did it come from?

MR. BECK: I think where it came from is probably the

instructions that came with the machine, and the instructions that came from the manufacturer, and that the way that votes are tallied, using the Votomatic machine is that somebody dislodges the chad fully, then the light shines through and it counts as a vote for Al Gore or for George Bush.

And no one has ever, previous to this in Florida, counted ballots any other way. No one had ever, previous to this, using Votomatic ballots, ever used the standard of indentations or anything else. So it was a machine count of the ballots with fully dislodged chads. And to do something other than that is a new and different standard, is your our position on that.

Secondly Your Honor --

THE COURT: It's sort of like a common usage, or common practice, as opposed to some standard proposed?

MR. BECK: It was not a legislatively -- it was not written in the statute, but it was -- when the officials who determined how votes were to be counted and tabulated brought the Votomatic machines, and followed the instructions from the Votomatic manufacturer, and put the instructions on the back of the voting booth, telling the voters what counts as a vote, and having the instructions in the ballots.

And what the instructions in the ballots say, and on the back of the voting booth say, is that in order to vote, you must fully dislodge the chad.

And it says that, if I haven't fully dislodged the chad you have to pull it off. So there, in fact, were written standards in the form of the instructions that were at the polling place on the wall, and in the back of the booth. We saw it on television. I don't know if you were paying attention to that part of the testimony.

And is written on the ballots, themselves. So the voters are instructed in language adopted by all the local officials across the state who use these machines.

So the standard is in writing, adopted by the local boards and given to the voters. So we do believe we have written standards that say: To vote, you dislodge the chad completely, otherwise it's not going to count as a vote.

So now to change that, we think would be a change in the law and, in effect, in the written standards, which would violate the federal statutes.

And we can elaborate on that tomorrow, if you want.

Then lastly, Judge, whatever procedure you adopt, and whomever you delegate the task to of reviewing the ballots, in the first instance, we think that for all challenged ballots, those should be segregated further, identified by number in some way, a record kept of the objections, and the arguments made, and those should come to Your Honor from around the state.

I don't know how many there's going to be, but they --

I think if the standards are articulated clearly enough, I don't think there's going to be very many nonvotes that are transformed into votes. If, in fact, the factors are identified correctly, there's very few people who put the ballot on top of the machine and leave a pattern, because they don't follow the instructions.

So it's not going to be that big an issue, I don't think, if the factors are clearly articulated.

But whatever they are, we think that disputes need to be resolved, in the last analysis, by this Court, rather than by your -- whoever you delegate the initial counting to, because the Canvassing Boards are not given any discretion in the contest. They're not mentioned in the contest.

And if the Supreme Court has decided to order, or to suggest to Your Honor that you can enlist their aid, we think that's a mistake. We think it creates horrible constitutional problems. But if you go down that road, then at the very least, there has to be some judicial review of these determinations that are being made by nonjudicial officers.

So we hope all of the challenged ballots will be bundled up, segregated, brought here to Tallahassee, and then we can have a hearing and go through them.

THE COURT: Mr. Myers? I'll give everybody a chance.

MR. MYERS: May it please the Court, as you may not be

aware, I represented West Florida Intervenors in this action. Early on in this litigation we had asked the Court to do a statewide manual recount and asked the Court to take a statewide perspective.

If the Court looks at page 38 of the Florida Supreme Court's decision, you'll see the Florida Supreme Court has agreed with the Intervenor's position that a statewide count should been done. So presumably they agreed with some of the positions we presented.

I wanted to answer Your Honor's question about votes that are no votes, or not undervotes, in other words, the overvotes, and perhaps the Military ballots, or any other absentee ballots.

I took some time to look through the Florida Supreme Court's order, Your Honor, to determine whether you should be ordering a recount of those.

If the Court looks at page 39, you'll see that the Florida Supreme Court has directed you to enter such orders as are necessary to add any legal votes to the total statewide certifications, any legal votes, Your Honor.

And if you look back, you'll see on page 16 of that decision that the Florida Supreme Court also agreed, it says, "We do agree that a manual recount be conducted for all legal votes in this state."

Furthermore, the Court further discusses the need for

looking at all legal votes in the State so that every vote that should have been counted is counted for purposes of this manual recount.

On page 11, the Court goes on to say, about halfway through the page, Your Honor: "The right to a correct count" --

THE COURT: What page?

MR. MYERS: Page 11, it's a quotation, as well established in this state by our contest statute. "The right to a correct count of the ballots in an election is a substantial right, which is the privilege of every candidate for office to insist on. In every case where there has been a failure to make a proper count, called tally, or return of the votes as required by law," and this fact has been duly established as the basis for granting such relief, a correct count of all the ballots, Your Honor, is one of the things the Supreme Court has pointed out to you.

And if you look at page 19, about two-thirds of the way down, over toward the right, you'll see it says, "The clear message from this legislative policy is that every citizen's vote be counted whenever possible."

So I think it's clear, Your Honor, that from the Florida Supreme Court's decision today, that as a floor or a minimum threshold for Your Honor, you must order a recount all of the undervotes.

However, the Court has broadly ordered you to include any legal vote that the Court feels would be there, and also to ensure that every legal vote be counted so that every citizen's vote would count in the State of Florida. I think it's pretty clear that the Court has the authority to do that here, and that would include absentee ballots, and would exclude the overvotes or no votes that had been registered. I'll represent to the Court that --

THE COURT: Can I stop you for a second? Do you consider overvotes and no votes or nonvotes the same thing?

MR. MYERS: Not necessarily, no, I don't. A no vote would be, for example, the counties reported, and it's part of the record in this case, that the State Elections Commission received a report that there were over 180,000 no votes. And those no votes would include undervotes and overvotes. So the no votes is a more, a broader concept.

THE COURT: So no votes include both undervotes and overvotes?

MR. MYERS: From my understanding, yes, Your Honor. I also point out to the Court that we heard testimony from Judge Burton in this particular trial. We learned that there is now an art to manually recounting the votes. It was readily apparent that he had picked up this art from obviously spending hours and hours from looking at these ballots.

I recommend to the Court that you, at least, at part of the hearing here look at some of the ballots by hand, so you can begin to understand some of the these that you would need to convey to the rest of the boards.

Also, Your Honor, if you would be so inclined to review the testimony of Judge Burton or others who actually went through a manual recount, you'll be able to pick up some of the standards that Mr. Beck was talking about earlier. So I recommend the Court do that.

Notice, you asked Mr. Beck about when and where. First of all, it's clear that the Florida Supreme Court intended that the votes be done in the counties in which they were cast, with the exception of those votes that are right here in Leon County.

We recommend to the Court that, at the earliest, the Court ordered the manual recounts to begin at noon tomorrow on Saturday. That would be sufficient notice for the public to go to the locations of the manual recounts so they could witness this, and also give sufficient time for the observers who want to be there, to be at the various locations throughout the state.

Any earlier than that, Your Honor, would deprive the public of proper notice to watch this proceeding.

I also recommend to the Court that you have a time certain for reporting the results of these manual recounts so

that we can meet our -- the deadline that we have on December 12th. I would recommend that noon on Monday the 11th, would be an appropriate time to stop the manual recount and report.

The reason I say that, Your Honor, is it will take time to tabulate the results. And the Court must also consider who do they report? To the Court? Well, who in the Court? And they need to understand that, because the Court administrator may not be able to physically receive 67 faxes, or I guess it would be more like 63 faxes from the various counties at five o'clock on Monday afternoon, in order to begin tabulating results?

Then, of course, as Your Honor knows, once the counties report, there has to be a tabulation of the statewide count and there need to be time for that to be don. That's why I recommended noon on Monday, at the latest, so that these results can be done.

I also agree with the concept that you have to look at all of the votes, or at least run all of the votes through the machines, in order to identify the no votes that have to be looked at by hand.

I recognize that there's not enough time in the next two days count 6,000,000 votes in the State of Florida. However, running those through the machines will eliminate the problems Mr. Beck identified, and that is every

time they're run through the machine, additional no votes are identified. So we have to make sure we get an accurate count. And that's of utmost importance to the voters in the State of Florida.

THE COURT: Let me ask you this: Every time you run it through the machine, you get a different count. Well, why would the count you do next time be any different than the one you already have?

MR. MYERS: The point is, if they have already run them through the machine and they already have their counts that they've certified -- and they've done it twice, we know -- then they may not be able to identify which of those votes had registered as no votes, without running them through the machine, again. If Your Honor orders them to only count the no votes, and they haven't segregated them, and we don't know that they have, then you have basically crippled that Canvassing Board from doing their job, and they're going to have a difficult time.

However, if you order every Canvassing Board to run them through, again, you ensure that everyone starts with the same ground zero approach, and that is that we make sure we separate the no votes away. And that way we're much more likely to have an accurate count come in from the Canvassing Boards once they report.

I also agree with Mr. Beck that you have to have

objective standards, Your Honor. And that's why I suggest you take a look at the votes. But Your Honor needs to tell statewide what those standards would be, so, again, the count is done with the same standard statewide.

And who will vote? I recommend to Your Honor that the people who vote are people who are experienced with handling these ballots.

Obviously, the Canvassing Boards are the best candidates; however, some of the Canvassing Boards will not have an opportunity to have just those three people that are members of the board do the count in some of the counties that have a large number.

So Your Honor has to consider how can they delegate to people that necessarily may not have any experience.

Let me give you an example: Let's say that Hillsborough County has to manually recount all of their undervotes this weekend. Well, up to now, to my knowledge, they've not had to do any manual recounts, so they haven't trained anybody up to now to know how to do a manual recount. And only the three members of the Canvassing Board are experienced with -- and their staff -- are experienced with handling the ballots themselves.

So the Court needs to give some direction to the Canvassing Boards, especially in the more populous counties, on how they are to delegate, if at all, to those members who would be

working for them, and what kind of training that they need to give them, in order to have this manual recount done within the two-day time period.

And I suggest to Your Honor, by giving a time certain that they have to report the results, and telling them how they must report the results will, of course, help them establish how fast they have to go through this process, how many people that they will need, and how they would go about it to meet the deadline.

Now it, there are some concerns about how to ascertain the Palm Beach County undervotes and overvotes or no votes. And I'm not sure that that's been handled by the Palm Beach County personnel.

However, Your Honor has to address the fact that those ballots were all shipped up here from both Miami-Dade County and Palm Beach County, and that they went necessarily segregated.

As I recall during last week, they began to separate some of the ballots from each other, and they were ordered by Judge Sauls to stop the separation and just pack them all up and send them up here. And they were doing some sort of separation down in Miami-Dade County, as I recall, or maybe Palm Beach County.

So Your Honor has to get some instruction for the personnel here in Tallahassee, on how the votes have been packaged in Miami-Dade County and Palm Beach County so that the personnel

up here have to figure out how they're go to do it.
And let me point this out to Your Honor : I don't believe Leon County has the machines to run the Miami-Dade County and Palm Beach County ballots through the machines to separate them. So that's a concern, because I know when we vote, we use the optical scanners here in Leon County.
If that's a concern, then the Court has to address that, as well, is how are we going to have a machine separate them when we don't have a machine here in Leon County that can actually run those ballots through.
And that may be that we have to have someone from Palm Beach County or Miami-Dade County to fly a couple of machines up here first thing in the morning so the Court can have the no votes separated from the rest of the ballots, so they can get started on the manual recount.
So those are all the concerns that we have. And from the point of view of voters in west Florida, we just ask that you keep in mind that the voters are the real parties in interest here in this particular case, and that we're trying to be protect the will of all of the voters of the entire State of Florida in whatever standards you give everyone. Thank you.
THE COURT: Thank you.
MR. DOUGLASS: Your Honor, just a short remark. Number one, what I'd like to ask the Court to consider, is that when we have these types of presentations, that we impose some

time standard in the matter. In the Supreme Court, for example, you've got so much per side. And you had to divide it.

Consequently we didn't have these long speeches by Intervenors who were in here by virtue of being allowed to come along as the Intervenors, and not to interfere in the suit.

But I would like to request that the Court consider, when we have these hearings, that we put a time line for that side and this side. Otherwise we -- we're usually very short, anyway, and it seems like we're outweighed.

Certainly we're outweighed tonight at least starting out. Our position as stated in our motion, which will be explained by Mr. Boies, is succinctly stated by the Supreme Court, we think, which says, "Time is of the essence," Even in this hearing. The circuit Court shall commence the tabulation of the Miami-Dade ballots immediately which they described above as the 9,000 undervotes which are segregated.

And the Circuit Court is authorized in accordance with the provisions of 168, which he will refer to, to be assisted by the Leon County Supervisor of Elections, or its sworn designee, which means you may employ others.

And, moreover, since time is of the essence, in any statewide relief, the Court must consider any further statewide relief that should be ordered simultaneously with

the Miami recount.
And so what we say, and Mr. Boies will answer some of the things, is that it should begin immediately, as we said, and go forth. And we had suggestions as how that would be done.
MR. BOIES: May it please the Court, my name is David Boies, and I begin by expressing my appreciation and I'm sure all of the parties' appreciation for sitting this evening. This is something that is obviously very important to us to be expedited.
In terms of what we would like to see the Court do, basically, what we would like to see the Court do is what the Florida Supreme Court has set out in its opinion.
First, there are 9,000 Miami-Dade County ballots that have not been manually reviewed, and those are the ballots that the Florida Supreme Court says should be reviewed immediately here. And they have set out a procedure that they've authorized the Court to use, not instructed the Court to use, but authorized the Court to use, in terms of using the supervisor of elections and that person's sworn designees.
The second thing that we would like the Court to do is to commence the manual recount for counties, other than Miami-Dade County, that have not already had a manual recount.

And I'm confronted a little bit with the Secretary of State saying that it must be done by the Canvassing Boards, and Governor Bush's lawyers saying: It can't be done by the Canvassing Boards.

We believe that the Supreme Court has said that it can be done by the Canvassing Boards. We believe it could also be done here in Leon County, using the Leon County Supervisor of Elections if the supervisor of elections had adequate resources to do that. We don't know whether that's so or not.

If there were adequate resources to do that, we would have no objection to Governor Bush's suggestion. And we believe that that would be entirely consistent with the Supreme Court's opinion; that is, we disagree with the Secretary of State that is somehow precluded. The Supreme Court's opinion, in other portions, makes clear this is a judicial function; that it is not a 166 protest. It is a 168 contest.

Not only the majority opinion, but two of the three dissenting Justices draw that distinction between 166 and 168, and make clear that 168 is a judicial proceeding, and not one where you have to give discretion to the Canvassing Boards.

So if there is adequate resources to do it here, we believe that that would be acceptable under the Supreme

Court's view. That's what Governor Bush's counsel has suggested, and we would be agreeable to that, too. Our only concern is whether or not there are adequate resources here to get it done in the time available.

Let me make one point that is a little bit, maybe, of an reargument of something the Supreme Court decided against us, but they've been rearguing a lot on what the Supreme Court decided against them.

THE COURT: Didn't they take my lead, though, when I told him about it?

MR. BOIES: I did, Your Honor. And I'll only mention this one thing, and that is -- and I'll do it, in part, because the Intervenor suggested it, as well, and that is the 3,300 votes from Palm Beach. Those were ballots that the Supreme Court said, we had not shown that the Palm Beach board didn't do those right. No one ever looked at those as a judicial matter.

And if we're going to go beyond the strictures of what the Supreme Court has laid down, we think the very first ballots -- and this may have been what the Intervenor had in mind when he talked about the need to look at the Palm Beach ballots.

The first ballots that ought to be looked at are those 3,300 ballots that are already here.

But we don't want to do anything until after everything

that the Supreme Court has ordered to be done has been done. Once that's done, maybe there's some things that they're suggesting that we could do. Maybe there's some things that we're suggesting that could be done. But I think the Supreme Court has made clear that there are certain limited things that have to be done immediately, and those are the things that we would ask the Court to focus on, at least first.

In terms of when, we think the Court meant immediately when it said, "Immediately."

Hours make a difference here. We would like to see the process with respect to the 9,000 Miami-Dade ballots start immediately. First thing tomorrow morning.

We would like to see the counties directed to start first thing tomorrow morning. If the counties are going to do it, or if it's going to be done here, that they be instructed first thing tomorrow morning to get the ballots here so they could be done here.

We think that hours are going to make a difference here. And the Court knows, I think, may know, that Palm Beach was shut out of the certification process because it finished its manual recount 127 minutes late.

Minutes may make a difference here. So we don't want to have any delay.

Let me just talk, in response to some of the individual

points that were made.
First, there was a question of what undervote meant.
The Court, the Supreme Court does use the term undervote and nonvote or no vote. I think it is clear from the context that all of those words are being used in the same sense; that is, a ballot for which there was no vote recorded for the presidential race.
There are overvotes where there are two or more votes recorded for the presidential race.
That's not what the Supreme Court was talking about. And, indeed, when you look at the use of the word, nonvote, or no vote, the Supreme Court uses that in the context of the 9,000 Miami-Dade votes.
And there's no dispute that the 9,000 Miami-Dade votes are undervotes.
So we think that what is at issue here are undervotes.
If somebody wanted to look at overvotes at sometime if there was time, I'm not sure we would have an objection to that.
But what we absolutely would object to is anything to do with overvotes, or any other votes, until we get what the Florida Supreme Court has ordered to be done, which is a review of all the undervotes.
The number that was given to the Court of about 64,000 undervotes may be somewhat high, because I think that number

may include undervotes from Broward County and Palm Beach County, which, of course, are two of the three largest counties with undervotes.

And those votes have already been taken care of by the Supreme Court.

In terms of the criteria to be used, we think the Supreme Court's opinion is quite clear. They talk about the clear intent of the voter, and we believe, that's always been the appropriate standard in Florida. Judge Labarga in Palm Beach County, issued two opinions on that.

And those were opinions that we had thought previously from what the Defendants had said, were opinions that they agreed with.

Those opinions make clear that it is not a punch-through standard, it is not a hanging chad standard. It is the intent of the voter, looking at the entire ballot.

We think that if you look at the cases the Supreme Court cites in its opinion, in its opinion, the Florida Supreme Court says, "There are a number of other states that follow the same principle," and they give three examples, Massachusetts, South Dakota, and Illinois.

And if you look at those three cases, and you look at what the Supreme Court of Florida says about those cases, I think you also get a sense of what the appropriate criteria is to use to identify the clear intent of the voter. For

example, the South Dakota case, the Duffy case that the Supreme Court cites in its opinion today, is a case that the Florida Supreme Court characterizes as holding that if you see a mark of some kind where a voter would ordinarily make a mark in order to vote, then, unless there's something that clearly indicates that that's not a vote, it should be considered a vote.

The Dellahunt case, which is a Massachusetts case that the Florida Supreme Court also cites in that same paragraph, is a case that holds that where you have an indentation on or near the chad, that should be counted as a vote.

The Pullen case, which is the third case, this is an Illinois case that the Court cites there, although it doesn't quote the Pullen case in this opinion, it did quote extensively from the Pullen case in its November 21 opinion, also talks about looking for what the reasonable interpretation of what the voter's intent was from the entire ballot.

So I think that the Supreme Court has made it clear, not only what the standard is, but what, if you need to be specific about particular criteria, what those criteria are.

So we think that that is something that does not need to delay the process.

We don't have an objection to them presenting to the Court summaries of evidence. We can present summaries of

evidence, too. It will not surprise the Court that there are some pieces of evidence that Mr. Beck did not mention that we think are important for the Court to consider.

But fundamentally, the Supreme Court of Florida has decided these questions. It has decided that there is go to be a manual recount. It has decided that that is not going to include all of the 6,000,000 ballots. It's only going to include the undervotes.

It's decided that those counts need to start now. It's decided that those are going to be done as a judicial matter, except to the extent that there are ballots in other counties that can be done there, or can be done here.

So I guess the bottom line, because we think the opinion is pretty clear, and we just think that it needs to be implemented as quickly as the Court is prepared to do that.

THE COURT: Well, in terms of who is going to do it, you say you don't care whether it's done by somebody up here, or the Canvassing Board, or the supervisor of elections down in the counties?

MR. BOIES: That's true, Your Honor. The only qualification is if, in consultation with the Supervisor of Elections of Leon County, the Court were to conclude that the resources here were not sufficient to do it, or it would -- I don't think this could possibly be the case, but if for some

reason we couldn't get the ballots up here; that is, if there was any practical consideration that meant that bringing the ballots here would make it unlikely that we were going to get it done, then we would say: Get it done in the counties.

And I think that's what was motivating the Florida Supreme Court. I don't think the Florida Supreme Court was saying: If has to be done in the counties, because elsewhere in the opinion, they make clear this is a question for judicial resolution.

But if we could get them here and get them done here on time -- and I think the number is such that you probably could, because I think the 54,000 number is too high.

And if the number were closer to 40,000, which is what I think it is, I think that is something that could be done in a period of time, if you had enough teams.

I guess the only other thing I would say is obviously, we don't have any objection to having observers. In the Supreme Court's Bechstrom's case, what happened there was that the Circuit Court had the Clerk of the Court review the ballots with a representative of each side present.

THE COURT: Clerk of the Court?

MR. BOIES: In that case, that was the Clerk of the Court. That was the 1998 Bechstrom court case.

THE COURT: Two observers?

MR. BOIES: One observer from each side watching it.

The only thing that we would ask is that the process not get booked down. The Court is well aware, with lawyers, you can make every ballot a federal case, to coin a phrase.

And I think that there are enough federal cases already in this matter. And what we need to do is we need to get on with the counting process.

All we really want is for the count to start soon, and to progress, so that we can fulfill what the Supreme Court has said, which is to get it done on time.

We think that if the counting is going to go down in some of the counties, they need to report by tomorrow at the end of the day, what their schedule is for completion, and how much they've gotten done. Many counties ought to be finished tomorrow. And we think that the Court can't wait until Monday to get reports.

I think the Court is going to have get reports on a daily basis to make sure there is not some problem that we don't know about that is too late, and we can't solve it.

MR. KLOCK: Your Honor, if I can address a couple points, very quickly. First, Palm Beach County, Mr. Boies referred to as being 127 minutes late. Currently they are 17,500 minutes late because they still have not filed a certificate indicating what the additional votes are that were due at five o'clock on the 26th.

The next point, Your Honor, is for those of us that are

local lawyers, generally speaking the stuff that is closer to the end of the order is more significant. And I would suggest that while Mr. Boies thinks the Supreme Court is sort of suggesting you can do it any way you want, I would refer you to the language at the bottom of 38: "Moreover because the venue of an action of an election contest covers more than one county than Leon County, the Circuit Court has jurisdiction to order the supervisor of elections and the Canvassing Boards, as well as the necessary public officials in all counties that have not conducted a manual recount or tabulation of the undervotes in this election, to do so forthwith. Said tabulation can take place in the individual counties where the ballots are located. That is nine lines before the "so ordered" language.

In addition to that, Mr. Boies has excellent recall. He indicated to Your Honor, he says, "Because time is of the essence, the Circuit Court, shall commence the tabulation of the Miami-Dade ballots immediately. But if you move on another sentence or two, it says, moveover, since time is also of the essence in any statewide relief, the Circuit Court must consider any statewide relief should also be ordered forthwith and simultaneoulsy with the manual tabulation of the Miami-Dade votes.

Two other points, Your Honor, the Florida Supreme Court, in the last paragraph says that that is defined under

101.561(5) of the Florida Statutes.
And when you compare it to the opinion, a legal vote as it is used there, is one that is decided by the Canvassing Board.
So the little adjustment to the Supreme Court's decision, is to go in and have the Court reexamine the 3,300 votes that were determined as illegal votes by the Palm Beach County Canvassing Board, and recognizes at the beginning of the Supreme Court's opinion, they are illegal votes forever, Your Honor. So they can never be recounted.
And I think the only other point I wanted to mention is with respect to overvotes and undervotes, you also have the problem when you get into the optical scanning votes, Your Honor. You simply can't do what they want to do with the undervotes, because, Your Honor, when you get to the optical scanning, sometimes what folks do is put an X in the box, instead of a complete circle. Sometimes it reads; sometimes it doesn't.
It clearly is as important a vote as a dimpled chad or something that is caused by a fingernail rubbing across a ballot, and clearly needs to be looked at. Sometimes, also, Your Honor, they color in the little box, or the little circle, rather, and they write the same name below it.
That is considered an overvote by the machine and not counted as well. That needs to be looked at.

And then the final point I had, Your Honor, was that -- that may be it. But these points are very important to be taken into consideration.

The final point is there needs to be time for appellate review. And the idea of having daily tallies -- the purpose of this drill, Your Honor, is to conduct a complete manual recount. Not to create opportunities for press conferences, two or three times a day to indicate how our guy is doing depending on whether you start at the bottom or the top end of the precincts.

So all this information has to be tallied at one time, because, otherwise, what it's going to be is a public spectacle which is going to be worse.

THE COURT: Let me ask you something, because the Secretary, at least it appears, doesn't have a preference for one side or the other. You're a Defendant because that's your job, and you have to certify the results.

Would you have any problem with, in terms of the logistics of getting results from the other counties, that they do it as they normally would do, which is to send it to your office?

MR. KLOCK: That would be nine. They know how to do that and they do it. And, Your Honor, with respect to the other arguments that are being made, under 97.012, the Secretary also has the responsibility for the uniformity of

elections, and how they're conducted and that kind of thing. So that is the reason why the other objection. You're correct, Your Honor, the Secretary does not have, as Secretary, a horse in the race. Nor does the Attorney General.

MR.GREENBURG: Your Honor, if I may, this is Murray Greenburg in Miami.

MR. DOUGLASS: That's what I was waiting on. It really wasn't, but I wanted to suggest this --

MR.GREENBURG: If I may, you have the ballots and all our elections --

THE COURT: Mr. Greenburg, can you wait a minute? I'll certainly let you talk. But I got a couple of them standing up there. I won't leave before I let you talk. Okay?

MR. BECK: Your Honor, I'd like to address a couple of points Mr. Boies raised.

THE COURT: Just one second, I think he's got a procedural point.

MR. DOUGLASS: I would suggest, again, we be a little more formal, because we made a presentation, they made a long, long, presentation. We made a presentation. And that, normally, in most proceedings, then the Court takes over and asks questions.

We don't want to get into this, again, because Mr. Beck is one of the longest speakers I know, and I would like to

ask that -- and he's from Illinois and they do things different there. But I would like to ask the Court to, please, if we could set some structure that would prevent this, where we finish, and they get up, again, because -- if it's just a little thing like the Secretary, he had a point there.

But, you know, we're going to be here forever. So I'm asking the Court, if we could, consider that, certainly, in future hearings.

THE COURT: Well, I can consider it right now, actually, because it is almost ten o'clock now, and I need to do something, otherwise we will be talking about what we're ease going to be doing forever.

MR. BECK: Your Honor, what they did in their presentation --

THE COURT: Let me stop you, Mr. Beck. I don't want I to argue back and forth and objecting. What I wanted nis input. And if you don't have any more input for me, that's fine. But if you have something that you should tell me I'm going to do, I will listen.

MR. BECK: I do, Your Honor. I first want to reinforce what the Secretary of State's counsel said, that we also are concerned about running tallies and press conferences. As far as we're concerned, there is no number that comes out of these things until the Court resolves any disputes as to

ballots.
And the Court ought to be releasing the information when it's done with its work, rather than having running voting tallies. So that as soon as, you know, one candidate gets in front of another, all of a sudden people are claiming victory. We ought to have the Court resolve the disputes and then release the results.
Another item that is also on your plate is you're going to need to hear from us both tomorrow, I would suggest, about how many there are down in Palm Beach.
Mr. Boies as used the number 215, which the Supreme Court used, but the Supreme Court also noted in a footnote, that we say it's a lower number, and that they take no positions on that. You're going to have to resolve that.
Your Honor, the Supreme Court says on page 39, when talking about Miami-Dade, about the counting machine registered these as nonvotes and they've never been manually reviewed. We think you have to look at all the nonvotes, not just the subset of undervotes.
Mr. Boies argued the South Dakota case as if that meant that any kind of dimple or indentation is an indication of intent.
I have the South Dakota case. What they say about -- they talk about two chads in the South Dakota case. And one of them was good old chad number 88, and they say, " Two of

the four corners of this chad had been broken and one side is separated." So that's a hanging chad. The other chad was a patterned chad, where they say, "It's important to note that when this ballot is viewed in its entirety, at least four additional chads are partially punched in the same manner."

So the only chads that were at issue in the South Dakota case that the Supreme Court referred to, were either hanging chads, or the kind of patterns that we talked about, not the kind of rogue dimples that they want.

Judge, in terms of the stages of a recount, and I don't want to bore you with the gory details. I suggest we present you with something in writing about the stages that people go through in a recount.

We think, briefly, that the counties ought to cull the nonvotes out from the other ballots, preserving the integrity of the counts, the way I referred to before.

We think that the Court should announce what factors are to be examined when determining voter intent, the criteria that are relevant to that determination.

THE COURT: I think you're summarizing your previous argument. I've got to get going.

MR. BECK: Okay. The last point, Judge, is Mr. Boies was absolutely wrong when he said three times that somehow Governor Bush suggested that the Leon County Supervisor of Elections was the right person for doing the job.

We say the Court should do it. The Leon County Supervisor of Elections -- I don't know him, and I'm sure he's an honorable man and a good public servant, but he's also a loyal Democrat.

Democrats on the Canvassing Boards of Miami-Dade and Broward County made the decision that turned hundreds of nonvotes into votes for Al Gore. And now they're suggesting that a Democrat in Leon County make the determination concerning the Republican counties, and we don't think that's right.

THE COURT: I think the Supreme Court is suggesting that the supervisor of elections in the counties may assist the Court in making the count. And I don't think the Democrats are suggesting anything.

MR. BECK: I'm suggesting to the Court that it's the Court's decision to make. It was authorized to do that by the Supreme Court. We think it's a bad idea. We don't think that if the concern is with public confidence and the integrity of the election, you should do that.

THE COURT: Let me ask all sides on this. The other counties, theoretically, as per the order, would have the Canvassing Board doing the counting, like they normally would, or somebody down there in the counties. What if the ballots were taken to Dade County, and a similar procedure was used there and then report back just like they normally

would? Any reason why it has to be done here?
MR. BECK: You said Dade County?
THE COURT: Yes. I'm suggesting to you --
MR. DOUGLASS: I understand.
THE COURT: Is there any reason why we couldn't take the Dade County ballots down to Miami, and let the people that normally would count them, count them.
MR. BECK: I think on that one, the Supreme Court was fairly clear. I thought the Supreme Court directed the Court to undertake that task. I think it left open to the Court to undertake the rest of the task, but that one, specifically, was directed to the Court to do it.
THE COURT: Well, yes. But, theoretically, they asked me to use the supervisor of elections here, or sworn designee. Is there any reason why that couldn't be the Dade County folks?
MR. BECK: We would object to that. We think the Court ought to be doing that, under the standards articulated by the Court we don't think that's contemplated by the Court's order.
THE COURT: Anyone else?
MR. BOIES: Just very briefly, Your Honor. I think we would agree that the Miami-Dade ballots ought to stay here. Our reasons are a little different, but I think the time consumed in sending that number of ballots back down, and

1 then getting the results back, would defeat the purpose of
2 the immediate review.
3THE COURT: Okay.
4MR. BOIES: With respect to Mr. Klock's point in which
5 he said that that, in reference to these ballots being
6 reviewed in the counties, nine lines from the end, it is nine
7 lines from the end, about, maybe a little more, but in those
8 nine lines is where the Supreme Court talks about the Court
9 having the assistance of the supervisor of elections.
10So I think you could use the supervisor of elections,
11 if the adequate resources were there.
12And, third, with respect to the criteria to be used, it
13 seems to me, if you're looking at the Duffy case, which is
14 South Dakota case, the right thing to look at is how the
15 Florida Supreme Court characterized that whole thing.
16THE COURT: Mr. Greenburg, it's your turn. Do you want
17 to say anything.
18MR.GREENBURG:Yeah, but, Judge, let me just say this
19 at this point: We will do whatever the Court wants. We're
20 here to assist the Court, the supervisor, and all the
21 officials here in the county.
22What we need to know -- and I think Your Honor will
23 agree with this -- we need to know soon. Our ballots are
24 there; we're here; we're fine with that.
25(LAUGHTER.)

MR.GREENBURG: The next plane would require our getting up at 4:30 in the morning, which is fine. But we need to know what you want to do, who you need up there.
And if it's just going to be legal argument, what time you would want anybody, we will do whatever you want. You've heard enough from all the lawyers, myself included. Just please tell us what you want us to do and we'll do it.
THE COURT: Thank you. I'm going to take a recess and consult the high authorities and be back with you -- I won't tell you when, but I'll be back before the evening.
And I'm sorry to make you wait, and I know everybody has been working overtime, but I'll have to come up with something, having had input from you, that I think will work.
I'll be back to tell you what I think it is.
(DISCUSSION OFF THE RECORD.)
RULING BY THE COURT
THE COURT: I apologize for keeping you all waiting. I know it's late.
Well, we've got two different counts to be concerned with. One is the Dade County ballots that are here in Leon County. The other involves the rest of the counties in the state. This is not perfect, but I'm going to give you what I plan to do with regard to both of those counts. You may have objections to that. You may have questions about it. But because of the lateness of the hour, and the exigent

circumstances, I ask that you make your objections in writing and give them to me tomorrow morning through the Court Administrator's Office. And I'll take some action on that and review them at that time.

First of all, when we do the count, what we're going to be looking at are what are considered nonvotes or undervotes. Those would be where a counting machine does not register the vote, or does not register all the vote.

For the Dade County vote, which is still here in Leon County, we will keep the ballots here and count them here.

I'm going to ask the supervisor of lections, or his sworn designee, I'm going to ask that Mr. Sancho contact Mr. David Leahy. Do we still have Mr. Greenburg? I guess that was a long time for him to wait on the phone.

I believe he was the attorney indicating they'd be willing to help any way they can. The staff of the Clerk of the Court is available for the purposes of helping in the count, the Supervisor of Elections can work with the supervisor in Dade County to the help count those votes.

I'm very concerned with the perception of these votes, and whether they're going to be done accurately and fairly. In that respect, I've asked my colleagues here in the Second Circuit to assist in this.

Theoretically, I guess we've had counts normally with teams of two. Normally there's a Canvassing Board there that would resolve any questions about whether a vote is or is not a vote. That's the way I understand this goes. For those teams of two, I have asked two judges to act as arbiters, basically, if there's a question about that, and those judges can resolve that dispute or question about the ballot.

If those two Judges can't agree, it will be sent to me and I'll resolve that finally. That's how we'll do the vote here.

I'm going to have them start tomorrow morning at eight o'clock.

And I believe the facility will be the Leon County Public Library. They'll have some room there to accomplish that.

The press will be allowed. We'll make arrangements. Any questions about how to do that should run through the proper administrator's office. The counting that's done there will be open for observation by the parties.

But what I'd like to do, even though this has been said in many Court cases so far, the voters are the real party in interest. There are two candidates here, that would be Governor Bush and Vice President Gore.

You can have anybody you want designated for a team. But all the rest of you, I'm sorry, I'm just going to leave

it that way. If you can get them to let you there, you can be an observer, as well.

If we start at eight, my target date -- not my final date -- but I hope to be finished no later than two o'clock p.m. on Sunday, which would be December the 10th.

As we discussed before, the Secretary of State, and the Divisions of Elections will assist.

It won't be necessary for ours here, but I'd rather go ahead and probably use that in terms of sending the results that we have here, through the Supervisor of Elections to the Division of Elections for a certification of those results.

At -- and I want to emphasize: This is not a protest count of votes. This is a count of votes as a result of a contest of an election, under which there is broad powers, apparently, for the trial judge to fashion a remedy.

So when I say there will be observers at the county, there won't be as you would normally have in a protest, the opportunity to make an objection to each ballot, to mark it, to see it.

You'll be able to observe. You can make a note on a notepad, if you'd like. You can raise those objections later in writing with me. But in terms of each individual ballot, I want the county to go as smoothly as possible. As I've indicated, there will be at least two other judges available to arbitrate any questions there. But I don't want anybody

raising a vocal objection at the time of the voting, or otherwise trying to disrupt the count in any way.

Now, for the other counties, just as the Supreme Court has indicated in its order, I would respectfully direct Canvassing Boards in the counties who have not, or have not previously done a manual count of nonvotes or undervotes, to take steps immediately to do so. Specifically, I would request that, by twelve o'clock p.m. tomorrow, Saturday, fax to the Office of the Court Administrator, which I do have that number somewhere, the fax number. Do I have somebody from the Court Administrator's office here? I sure don't want to give out mine. (850) 487-7947.

What I'd like faxed there is some indication of the protocol purported or proposed by the Canvassing Board. And this could be the Canvassing Board, but not limited to the Canvassing Board. But such other public officials, including the Supervisor of Elections, and their offices, staff, employees, whatever is necessary in their estimation to do the count required by the Supreme Court with, again, a target date of 2:00 p.m. on Sunday for those results to be sent from there to the Division of Elections for certification.

The same procedure would apply in terms of the observers, in terms of the objections, and the indications that I had before as to the vote in Leon County.

I'm not going to direct exactly how to do that. I'm

going to leave that to the discretion of the Canvassing Board, in terms of deciding the parameters of who would do the counting and how they'll do it. To my colleagues around the state, my judicial colleagues, I would request that you offer your assistance in the same manner my colleagues here in the Second Circuit have offered, for the reason I have indicated, to give some objectivity and partiality to the process itself, to reduce, to the extent possible any objections to the manner in which it was conducted. I'm not directing that or ordering that, but simply a request. And I'll leave it to the Canvassing Boards to decide how they will best do it. But they will report by twelve o'clock the protocol they intend to use, the estimated time schedule, and I'll review that at that time.

The standard to be applied in doing this count is the standard that the Supreme Court has set forth in its recent order.

The Supreme Court has twice been given the opportunity and requested to get more specific criteria in terms of how to count ballots manually. They've declined to do so. And I see in that a clear indication that they wish to leave that to the Canvassing Boards and the persons that do the manual counting, guided only by that principle that's laid out in the opinion.

I think I indicated, I would ask that the Canvassing

Boards in those counties, when they've completed their counts, to forward that through the normal procedures to the Division of Elections for certification.

And with that, I know you probably have questions and objection. As I indicated before, if you'll put those down in writing, I will do my best sometime tomorrow morning to reduce this to writing. And if I could get a transcript, that would help me. I would appreciate it. But I need something in writing.

MR. BECK: We will put our objections in writing in the morning. I just want to alert the Court that there was an outstanding matter in front of Judge Sauls. We had made a motion to exclude the Miami-Dade ballots on grounds of ex--

THE COURT: Mr. Beck, I just said, put all your concerns in writing. I will not hear any thing more tonight.

MR. BECK: I'm concerned that the counting is going to begin before the Court hears the evidence on whether the ballots are in shape to be counted.

THE COURT: I understand. Any concerns you have, any objections you have, put them in writing. I'll review them in the morning. Put them through the Court Administrator's office. I'll be in touch with the attorneys through the Court Administrator's office. We may meet again, but that's what I'm going to do. Thank you very much.

(HEARING CONCLUDED AT 11:49 P.M.)

CERTIFICATE OF REPORTER
STATE OF FLORIDA:
COUNTY OF LEON:

I, B. J. QUINN, Certified Realtime Reporter, Registered Professional Reporter, and Notary Public in and for the State of Florida at Large:

DO HEREBY CERTIFY that the foregoing deposition was taken before me at the time and place therein designated; that before testimony was taken, the witness was duly sworn; that my shorthand notes were thereafter transcribed, via computer, under my supervision, and the foregoing pages numbered 1, through 66, are a true and correct record of the aforesaid proceedings. I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

WITNESS MY HAND AND SEAL this, the day of OCTOBER, A.D., 2000, IN THE CITY OF TALLAHASSEE, COUNTY OF LEON, STATE OF FLORIDA.

B. J. QUINN, RPR, CCR, CMR
Certified Realtime Reporter
519 East Park Avenue
Tallahassee, Florida 32301
(850)222-5508
My Commission Expires March 20, 2001

CERTIFICATE OF NOTARY
STATE OF FLORIDA:
COUNTY OF LEON:

I, B. J. QUINN, Notary Public in and for the State of Florida at Large, do hereby certify that the witness personally appeared before me and was first duly sworn by me to testify to the truth on the date and time indicated herein.

B. J. QUINN, RPR, CCR, CMR
Certified Realtime Reporter
519 East Park Avenue
Tallahassee, Florida 32301
(850) 222-5508.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

ALBERT GORE, JR., AND
JOSEPH I. LIEBERMAN,

vs.

CASE NO. 00-2808

KATHERINE HARRIS, as Secretary,
etc., et al.,

_____/

ORDER ON REMAND

This case is before the Court upon remand from the Supreme Court of Florida in **Gore v. Harris**, No. 00-2431 (Fla. Dec. 8, 2000), and upon recusal of the original trial judge. Pursuant to the instructions provided by the Supreme Court of Florida, the Court will immediately tabulate by hand the approximate 9,000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed. The Court will include in such tabulation the additional legal votes for Gore in Palm Beach County and the 168 additional votes from Miami-Dade County.

In accordance with the provisions of Section 102.168(8), Florida Statutes the Leon County Supervisor of Elections or its sworn designees, which may include election officials from Miami-Dade County, will assist the Court with the manual recount. The counting process shall begin at 8:00 a.m. on Saturday, December 9, 2000, at the Leon County Public Library with sufficient two person teams of counters so as to complete

the count by 2:00 p.m. on Sunday, December 10, 2000.

In determining if a legal vote has been cast, the standard to be applied is: if there is a "clear indication of the intent of the voter" then the vote should be counted. If not, the vote should not be counted.[1] If there is a question in this regard as to any ballot, it shall be reviewed and determined by a team of two judges from this circuit, several of which will be on-site. If the two judges do not agree, the ballot will be segregated and reviewed by me for final determination. No partial counts will be done or reported, formally or informally.

For each team of counters, Plaintiff Gore and Defendant Bush may designate one person to act as an observer of the process. This person may not make a verbal objection or challenge to any particular ballot determination nor in any way disrupt or interfere with the counting process. Any objections or challenges shall be in writing and filed with the Clerk of Court.

The Supervisor will report the final results to the Court upon completion, and shall certify the results to the Division of Elections. Any additional votes as determined by this Court in resolving disputed ballots shall be added to these totals for certification by the Division of Elections.

The Court, consistent with the Supreme Court's Opinion, hereby directs that the

[1]Some of the parties have requested that I establish specific criteria to utilize in applying this standard. The Florida Supreme Court has been asked at least twice recently to do so and has specifically declined. The only guidance is the language in the statute quoted above.

Supervisors of Election and the Canvassing Boards, with the assistance of any necessary public officials, in all other counties that have not conducted a manual recount or tabulations of the non-votes or undervotes to do so forthwith, said tabulation to take place in the individual counties where the ballots are located. The standard to be applied in determining what is a legal vote, the time targeted for completion, and the method of reporting results, shall be the same as noted above for the counting of the Miami-Dade County votes.

In the interest of promoting the public's trust and confidence in the objectivity and impartiality of the counting process, the counties are urged - but not required - to enlist the services of its judges where appropriate, in a manner similar to the process outlined above. The method and manner of the count shall be determined by the Canvassing Boards.

The Canvassing Boards of the respective counties shall fax to the Court at (850) 487-7947 by noon, Saturday, December 9, 2000, a report as to their proposed protocol for the count and an estimate of the time to complete, and any problems anticipated by the Boards are also directed to advise the Court by 10:00 a.m. on Sunday, December 10, 2000, as to the status of the count, and from time to time as the Boards deem appropriate.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 9th day of December, 2000.

TERRY P. LEWIS, Circuit Judge

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA, CIVIL DIVISION

ALBERT GORE, JR., Nominee of the Democratic Party of the United States for the President of the United States, et al.,

Plaintiffs, CASE NO. 00-2808

v.

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, et al.,

Defendants.
_____/

OBJECTIONS OF SECRETARY OF STATE AND ELECTIONS CANVASSING COMMISSION

Under Section 97.012, Florida Statutes, the Secretary of State is the Chief Elections Officer of the State of Florida. It is the Secretary's duty to obtain and maintain uniformity in the application, operation, and interpretation of Florida's election laws. Under Section 102.111, Florida Statutes, the Canvassing Commission certifies the returns of the elections and determines and declares who has been elected for each office. Accordingly, pursuant to the Court's directions, the Secretary of State and the Canvassing Commission hereby submit their objections to the process and standards for the statewide partial manual recount ordered by the Florida Supreme Court in this presidential election and in this Court's order, entered in open Court at 11 p.m. on December 8, 2000, in accordance with the Florida Supreme Court's judgment (the “Order,” all collectively the “Procedure”) as follows:

1. There is insufficient time, due to the impending federal deadlines to complete any manual recount with any degree of accuracy applying meaningful standards.

2. The Procedure permits no opportunity for meaningful appellate review or for meaningful review by this Court of the decisions and conclusions reached in the various counties conducting the partial manual recounts.

3. Any manual recounts undertaken must be on a statewide basis, and must be of all ballots, not a subset of ballots culled though standardless and undefined exercise of unreviewable discretion of persons and entities not before the Court who are attempting to identify “undervotes” for further review.

4. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the partial manual recount of ballots solely to address voter error.

5. There is no basis in the Florida Statutes in existence prior to November 7, 2000, that would permit a manual recount of ballots in circumstances other than for the reasons and in the manner set forth in section 102.166(4) to (7).

6. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a manual recount in Miami-Dade, Broward, or Palm Beach Counties following the results of the manual test undertaken by each county's canvassing board pursuant to Section 102.166(4) prior to the initiation of the manual counting.

7. To the extent that the Court is ordering a recount of less than all ballots, it must at least consider all ballots including overvotes, undervotes, and any other category of “non-votes.”

8. There is no basis in Florida law in existence prior to November 7, 2000, to undertake only a count of undervotes when those numbers of votes are to be added to additional votes gleaned from a larger selection of votes.

9. The law of Florida in place on November 7, 2000, did not permit the elections supervisor or canvassing board of one county to count the ballots of another county.

10. There is no basis in Florida law in existence prior to November 7, 2000, that would permit Miami-Dade County's ballots to be counted in Leon County outside of the presence of voters from Miami-Dade County and by officials other than those identified in sections 102.166(7).

11. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a contest of undervotes to be initiated in the contest phase over a two-day period with another two-day period being provided for all appellate review.

12. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the counting by machines or by humans of other than fully punched chads.

13. There is no basis in Florida law in existence prior to November 7, 2000, that would permit some races in Florida to be decided on statewide manual recounts while others are not.

14. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the Miami-Dade Canvassing Board to use a software program that supposedly separated “undervotes” from properly voted ballots when such program has not been approved in advance by the Division of Elections, as required by Florida law.

The Secretary objects to the sorting of ballots based on software that is untested and uncertified by the Florida Division of Elections in violation of preexisting Florida law and practice.

15. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a circuit judge to order ballots to be counted without requiring the counting individuals to measure each ballot against the instructions provided to the voters when using the punch-card and ballot voting devices as required by Florida Statute section 101.46.

16. To permit individuals drawn from the Leon County Circuit Court to sort and make canvassing board decisions for Miami-Dade County votes differentiates Miami-Dade County voters in that their votes are not being counted by fellow county citizens drawn from the same county and they are deprived of local standards that were available to voters in Broward and Palm Beach counties.

17. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the manual recount of all ballots in some counties such as Broward, Palm Beach and Volusia counties while the recount of votes in other counties are being limited to “undervotes.”

18. The Secretary objects to the Procedure and any partial statewide manual recount which results in abrogating the rights of citizens under the equal protection and due process clauses of the United States Constitution.

19. The Secretary objects to the counting of ballots from Miami-Dade County under a process separate and distinct from the process to be applied in the other counties of Florida without meaningful standards.

20. The Secretary objects to conducting a partial manual recount in the absence of any valid, coherent reason for such a recount and without an evidentiary basis supporting the necessity of any recount.

21. The Secretary objects to a manual recount of a less than all the ballots of Miami-Dade County because there is no evidentiary basis to conclude that the subset of ballots culled from Miami-Dade County for a manual recount constitutes votes which have not previously been counted. The process ordered is likely to result in the counting of votes multiple times and therefor the dilution of other votes not so counted.

22. The Secretary objects to the inclusion of the Palm Beach County recount because to this day, no executed return of results from Palm Beach County has ever been submitted and there is, therefore, no legal basis for including such votes in any final tally.

23. There is no basis in Florida law in existence prior to November 7, 2000, that would permit assignment of subjective voter intent based on subjective interpretation of ambiguous, undefined marks on computer punch cards.

24. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the assignment of subjective voter intent based on subjective interpretation of ambiguous, undefined marks on marksense ballots.

25. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a court to establish the procedures for undertaking a manual recount of ballots and in determining voter intent.

26. Any attempt by a court to establish criteria and standards for determining voter intent invades the province of the legislature in the selection of presidential electors.

27. The Procedure intrudes upon the powers and duties of the Secretary and the Commission by stripping both of any but ministerial duties in the election process.

28. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a selective county challenge of a statewide race or the challenge of races that extended beyond any one county without the objector seeking a recount in all of the counties affected by the race.

29. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a contest of undervotes to be initiated in the contest phase over a two-day period with another two-day period being provided for all appellate review.

30. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the circuit court to issue advisory opinions regarding the conduct of the balloting and tabulation process.

31. The Secretary and the Commission object to the procedure to the extent that the Procedure violates Sections 102.141(2), 101.572, or the Florida Sunshine Law.

Dated this _____ day of December, 2000.

Respectfully submitted,

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December 10, 2000
Amicus Brief of Florida Legislature in the Matter of Stay of the United States Supreme Court

No. 00-949

IN THE
Supreme Court of the
United States

GEORGE W. BUSH and RICHARD CHENEY
Petitioner,
v.
ALBERT GORE, JR., *ET. AL.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF THE FLORIDA HOUSE OF REPRESENTATIVES AND FLORIDA SENATE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY AND SEEKING REVERSAL

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December 10, 2000

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

2. Whether the Florida Supreme Court erred in establishing post-election judicially created standards that threaten to overturn the certified results of the election for President in the State of Florida and that fail to comply with the requirements of 3 U.S.C. §5, which gives conclusive effect to state court determinations only if those determinations are made "pursuant to" "laws enacted prior to" election day.

3. Whether the use of arbitrary, standardless and selective manual recounts to determine the results of a presidential election, including post-election judicially created selective and capricious recount procedures, that vary both across counties and within counties in the State of Florida violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

INTEREST OF THE *AMICI CURIAE* [1]

The Florida Legislature[2] is, as this Court recognized in its prior opinion related to this matter, the entity that has plenary power over — and ultimate responsibility for — directing the manner in which Electors are appointed to represent Florida in the Electoral College. This case implicates the Florida Legislature's vital interest in having this election conducted in a manner that is orderly, fair, constitutional, and in conformity with the Legislature's directions. More, it implicates the constitutional duty of the Florida Legislature to assure that Florida "shall" be represented in the Electoral College and have its electoral votes deemed binding when counted by Congress. U.S. CONST. ART. II, §1, ¶2; 3 U.S.C. §5.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article II of the U.S. Constitution assigns State Legislatures the responsibility for directing the manner for appointing Presidential electors. The Florida Legislature has discharged that responsibility by enacting a detailed code for the selection of Florida's electors. As we explain in detail in this brief, the Florida Supreme Court's decision not only changes, but engages in wholesale re-writing, of the Legislature's directions. At the heart of its decision is the Florida Supreme Court's premise that an interpretive manual count is more accurate than a mechanical count and outweighs any need for finality and meeting deadlines -- both of which are contrary to the Legislature's premise. If the decision below is allowed to stand, the Electors will have been chosen not "in such Manner as the Legislature ... may direct," U.S. CONST., Art. II, §1, but in a manner newly conceived and promulgated for this occasion by four justices of the Florida Supreme Court.

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The Florida Legislature has secured the consent of all parties to the filing of a brief as *amicus curiae* and those consents are being lodged with the Clerk of the Court.

[2] We use the term "Florida Legislature" to refer to both the Florida Senate and the Florida House of Representatives.

This anomalous ruling not only displaces the authority of the Florida Legislature but places at risk the participation of the Florida voters in the election of the next President because Congress plainly may deem it a change of law that makes the safe harbor of 3 U.S.C. §5 unavailable. Even without that risk, the manual recount decreed by the court below cannot possibly be finally determined by the deadline of midnight December 11 set out in 3 U.S.C. §5. Whether or not the chaotic, inconsistent, and standardless manual recounts required by the court's order could be completed by the deadline, the ensuing legal challenges certainly could not. Nor, as Chief Justice Wells' dissent pointed out, would such a dubious and poorly monitored process secure a more accurate determination of the will of the people. Indeed, the very irregularity of such a process might itself lead the Congress of the United States to question whether the votes of such Electors have been so "regularly given," 3 U.S.C. §15, and thus may put those votes in question even if contests could have been resolved in a timely manner.

The decision below also disregards the mandate of this Court delivered only one week ago in *Bush v. Palm Beach County Canvassing Board*, 121 S.Ct. 471 (2000), vacating the Florida Supreme Court's earlier decision and judgment in that case. One example of that disregard is the remarkable and unjustified order requiring the inclusion of several hundred votes in Palm Beach and Miami-Dade counties added in a manual recount that had proceeded past the Secretary's statutorily mandated deadline of November 14. In giving this order, the court below gave effect to a judgment and decree that this Court had vacated. Nor is it even plausible to argue, as the Florida court did, that these votes were being added because after all they had been counted by the county canvassers during that first questionably extended recount period. That recount, which had taken place during an extension which this Court had vacated and therefore nullified, was conducted under the rules governing *protests* and not the more stringent rules governing *contests*. Election protests, under which those votes were added, are conducted by the canvassing boards alone. But the procedures which the court below was supposed to be adjudicating were election contests, which are carried out by a judge, after hearing evidence and argument in open court. Those hundreds of votes added by the order of the court had never been subjected to such testing.

Finally, the decision below puts the State of Florida in violation of the United States Constitution, posing yet another risk to Florida's representation in the Electoral College. The right to vote and the right to have one's vote given equal effect are fundamental rights. A State may not design its system for selecting presidential Electors in a way that burdens or distributes that right unequally. The scheme the court below has put in place for counting the votes for President is so replete with arbitrary and unjustifiable distinctions that it violates Equal Protection. Any designation of electors in this way might thus subsequently be either constitutionally invalidated by the courts or rejected by Congress when it counts the electoral votes.

In our brief as *amici curiae* in *Bush*, *supra*, the Florida Legislature argued that this Court should decide that the ultimate forum for resolving the disputes arising out of this extremely close and troubled election is in the political branches–the Florida Legislature and U.S. Congress–whose members will have to pay a swift and certain political price for an unfair and unwise decision. So that suggestion not be misunderstood, we also stated (and reiterate today) that the Florida Legislature will faithfully comply with this Court's resolution of these problems and with any decision it makes about which entity has authority to redress them. But whether this Court decides that the ultimate forum for correction lies in this Court or in the political branches, the decision of the Florida Supreme Court must be corrected as quickly as possible.

ARGUMENT

I. The Florida Supreme Court Has Distorted and Disregarded the Legislative Scheme for Presidential Elections in Violation of Article II.

A Presidential elector can constitutionally be appointed only "in such Manner as the [State] Legislature thereof may direct." U.S. CONST. ART. II, §1, ¶2. If an elector is appointed in some manner other than that directed by the State Legislature, that appointment is unconstitutional.

This constitutional clause confers "plenary power to the state legislatures in the matter of the appointment of electors."

McPherson v. Blacker, 146 U.S. 1, 35 (1892). Indeed, as this Court recognized, in "the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution." *Bush v. Palm Beach County Canvassing Board*, No. 00-836, Op. at 4 (Dec. 4, 2000). Thus, this direct grant of authority "'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power.'" *Bush*, *supra*, at 5 (quoting *McPherson*, 146 U.S. at 25).

State courts may not invoke even the state constitution to circumscribe this state legislative power. *Bush*, *supra*, at 5, 7.[3] But to say this is not at all to authorize state courts to circumscribe the legislative power based on *non*-constitutional judicial views about the best manner of choosing electors. To the contrary, state courts have even less grounds to deviate from the state legislature's directions when they do not even have a purported basis in the state constitution. Indeed, of all the possibilities that the Founders considered when they decided to whom to give the power to appoint Presidential electors, the one possibility that was universally rejected by the Founders was to allow the manner of such appointments to be controlled by state courts. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 110 (Max Farrand ed. 1966) (James Madison: "The State Judiciarys had not & he presumed wd. not be proposed as a proper source of appointment" of the Presidential electors).

A. The Legislative Directions on the Manner of Conducting Elections. Before this election, the Florida Legislature provided a detailed and orderly scheme for the resolution of election protests and contests. Under those legislative directions, all

[3] *See McPherson*, 146 U.S. at 34-35 ("This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.") ((quoting favorably Senate Rep. No. 395, 1st Sess. 43d Cong. (1874)).

machine ballots must be counted by machines that use a uniform standard. Manual recounts are permitted only in limited cases involving defective machines or ballots, are subject to strict limitations on how they may be conducted, and when legally denied cannot be required by merely bringing a contest action

1. Manual Recounts Are Rarely Permitted. The legislative directions provide that manual recounts are permitted only if particular ballots were damaged or defective, or if a particular county's machines were defective in a way that made them tally votes incorrectly, and even then only if those defects could not otherwise be corrected. *See* FLA. STAT. §101.5614(5); FLA. STAT. §102.166(5). The Legislature nowhere authorized wholesale manual recounts based on the dubious empirical premise that manual recounts can "interpret" ballots more accurately than well-functioning machines. To the contrary, permitting manual recounts on that basis is contrary to:

(a) The statutory text, which allows manual recounts only for otherwise uncorrectable "error in vote tabulation," FLA. STAT. §102.66(5), not for a claim that even well-functioning machines err in "ballot interpretation." Not only does the term "tabulation" indicate a merely ministerial tally, but the term "vote tabulation" indicates that the tally was meant to tabulate already recognized votes, not to determine whether the ballot rendered a vote at all. Likewise, FLA. STAT. §102.66(5)(a)&(b) clearly indicate that the Legislature thought the type of problem justifying a manual recount would normally be correctable by fixing the machines or software. These provisions would not make sense if the Legislature thought the problem justifying correction was that even well-functioning machines count less well than humans.

(b) The statutory structure, which allows manual recounts only on a county-specific basis. *See* FLA. STAT. §102.166. The county-specific nature of the manual recount would not make any sense if the gravamen of the complaint were that even well-functioning machines miscount votes, since that complaint applies statewide. But this county-specific legislative direction does make sense if manual recount authorization is limited to errors in counting made by a particular county's machines. Similarly, the fact that the statute requires a manual recount of "all ballots" in the county, FLA.

STAT. §102.166(5)(c), makes sense if the gravamen of the complaint is a problem with the ability of that county's machines to count any ballot, rather than an interpretive problem limited to so-called "undervotes."

(c) The statutory deadline, which requires that manual recounts be finished within seven days of the election. *See* FLA. STAT. §102.166; FLA. STAT. §§102.111-112. This legislatively imposed deadline makes perfect sense if the statute is limited to correcting defective machine counting. Such problems arise seldom, and normally can be corrected by fixing the machines or software. Moreover, even when a manual recount is required, a ministerial manual recount (as opposed to an elaborate "interpretive" manual recount) can easily be done within a seven-day period by hiring additional counting teams. Indeed, the Florida Legislature has expressly directed that, to meet the deadline: "The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots." *See* FLA. STAT. §102.166(7)(a). Because the manual recount is meant to be ministerial rather than interpretive, adding counting teams in larger counties avoids the bottleneck problem that results when interpretive decisions must be made by a three-person canvassing board for each county.

(d) The statutory purpose, which the face of the statute plainly indicates is to use manual recounts only as a last resort. If manual recounts could be justified on the ground that they were more accurate than machine recounts at interpreting ballots, then it would follow that manual recounts should always be done in **every** close election. But this would make a manual recount the first resort rather than the last. Further, it would be inconsistent with the fact that the Legislature specified that the statutory remedy for a close election was a machine recount, not a manual recount. *See* FLA. STAT. §102.141(4). The Florida Legislature, in determining the manner of conducting Presidential elections, was surely free to adopt the premise that interpretations by well-functioning machines (while not perfect) are more accurate than "interpretive" manual recounts, which are susceptible to problems of fatigue, human error, unintended ballot alteration, inconsistency across counters and counties, conscious or unconscious bias, and fraud or other mischief.

(e) The opinion of the Secretary of State, whom the Legislature directed would (rather than the courts) be in charge of issuing binding opinions interpreting these provisions for county boards, and assuring uniformity among them.[4] She opined that manual recounts were not available when voter error produced partially perforated or indented chads that were not registered as votes by non-defective machines.

(f) Prior practice before this election, which was not to do a manual recount because of a claim that a county's machines were failing to count partially perforated or indented chads. *See* Transcript of Oral Arg. in *Bush*, *supra*, at 39-40 (concession of Florida Attorney General that no county had previously done so). For example, in *Broward County Canvassing Board v. Hogan*, 607 So.2d 508, 509 (Fla. 4th DCA 1992), the board recognized that "voter errors in the piercing of computer ballot cards created loose or hanging paper chads." But the board declined to do a manual recount even though two machine counts indicated a margin of 3-5 votes. "Such voter errors, the board explained, are caused by hesitant piercing, no piercing, or intentional or unintentional multiple piercing of computer ballot cards, creating what are referred to as overvotes and undervotes. The board *thereupon* denied appellee's request for a recount." *Id.* (emphasis added). Thus, before this election, the fact that a request for a manual recount was based on incompletely perforated chads was considered not just insufficient, but an affirmative reason to reject a manual recount because the request was based on voter error rather than on machine or ballot defects.

2. Manual Recounts Must Meet Strict Conditions. To the extent manual recounts are permitted under this statutory scheme, their conduct is subject to five conditions:

[4] FLA. STAT. §106.23(2) ("The Division of Elections shall provide advisory opinions when requested The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought"); FLA. STAT. §97.012 ("The Secretary of State is the chief election officer of the state, and it is his or her responsibility to: (1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.")

(a) The manual recount must include all ballots affected by the relevant defect. If a manual recount is done, the Legislature directed that it must count "all ballots" in the county having machine problems, FLA. STAT. §102.166(5)(c), or if the problem is defective or damaged ballots, then "all such ballots" must be manually recounted, FLA. STAT. §101.5614(5). Partial manual recounts were nowhere authorized by the Legislature.

(b) Any manual recount cannot count dimpled or pregnant chads. If a manual recount is done, it should not count a ballot as a vote unless the ballot left a "clear indication of the intent of the voter as determined by the canvassing board." FLA. STAT. §101.5614(5). *See also* FLA. STAT. §102.166(7)(b). This was previously determined by the only canvassing board to address the issue before this election, Palm Beach County, as meaning that chads could only be counted as votes if at least two corners were detatched, and not if the chad was merely dimpled or pregnant. *See* Petitioner Exh. J. Prior to this election, no Florida county board had ever counted a dimpled or pregnant ballot as a vote.

(c) Any manual recount must be completed in accord with standards for counting chads that are uniform across the counties. The Legislature has directed: "The Department of State shall adopt rules prescribing standards for ballots used in electronic or electromechanical voting systems. Such standards shall ensure that *ballots are counted in a uniform and consistent manner* and shall include, without limitation, standards for the ... Scoring of ballots." FLA STAT. §101.5609(8) (emphasis added). *See also* FLA. STAT. §97.012 (the Secretary of State shall "Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.")

(d) The results of any manual recount completed more than seven days after the election are not legal votes. The Legislature directed that any votes added by manual recounts after the seven-day deadline are not considered legal votes that must be counted, but to the contrary are votes that "shall be ignored." FLA. STAT. §§102.111.[5]

[5] Pursuant to a consent decree with the federal government, Florida law

(e) County boards have discretion not to do manual recounts. See FLA. STAT. §102.166(4)(c) ("The county canvassing board may authorize a manual recount."); *Hogan*, 607 So.2d at 510 ("The statutes clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the canvassing board.") A county thus need not proceed if it cannot complete a manual recount of all the ballots under the correct standards by the statutory deadline.

3. Contest Procedures Do Not Expand the Limits on Manual Recounts. The Legislature also authorized a contest procedure. But the legislative directions on the manner of conducting contests nowhere suggest that the contest procedure was intended to overturn the statutory scheme and create an automatic right to manual recounts in every close election. That would have been inconsistent with the statutory preference for machine recounts. Nor would there have been any reason to make the contest right to manual recounts broader than the protest right to manual recounts. That would saddle courts with manual recounts that county boards could have done, and would put courts in the odd position of ruling that it was illegal for the county boards or elections commission to deny manual recounts even though other statutes authorized or required the board or commission to do so.

To the contrary, what the contest statute provides, in the key section stressed by the Florida Supreme Court, is that one ground for a contest is: "Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." FLA. STAT. §102.168(3)(c). If a well-functioning machine interprets a ballot as not having made a vote, then that is the rejection (or counting) of a legal *non-vote*, not the rejection of a legal vote, for legally the ballot has not registered a vote in the manner directed by the Legislature. *See supra*. Likewise, if a county properly exercises its discretion not to do a manual recount, then any ballot that is counted as a non-vote by a machine is the rejection (or counting) of a legal non-vote, not the illegal rejection of a legal vote. Thus, Florida law before this election did not interpret the right of a contest to allow a manual

also allows for the later receipt of military and other overseas ballots.

recount in a contest when a manual recount had been rejected by the county. *Hogan*, 607 So.2d at 510 ("Although section 102.168 grants the right of contest, it does not change the discretionary aspect of the review procedures outlined in section 102.166.") Finally, if votes are rejected because they were produced by a manual recount that came in after the statutory deadline, FLA. STAT. §§102.111, then they are rejected legally, not illegally, and thus do not represent the rejection of legal votes.

In short, rejecting ballots that the county boards or election commission legally deemed non-votes according to the statutory directions of the Legislature cannot constitute the improper "rejection of . . . legal votes" under the contest statute. To say otherwise would mean that the Legislature was requiring or authorizing county boards and election commissions to make a decision not to count certain votes that the Legislature later would want overturned by courts in a contest action. Such a reading would be completely nonsensical — the Legislature cannot have meant to require or authorize election agencies to act in a way the Legislature thought courts should deem illegal.

Consistent with this, the interpretation of Florida's contest statute before this election has always required that the plaintiff prove "substantial noncompliance with the election statutes" as well as a "reasonable doubt" as to whether the illegal noncompliance affected the outcome. *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720, 725 (Fla. 1998). For example, in rejecting a contest action seeking a manual recount because of partially perforated chads, the court held: "All that should have been considered by the lower court was whether appellant failed to perform some mandatory statutory act or whether there were any electoral improprieties which had, not possibly might have, an influence on the ultimate choice of the voters." *Hogan*, 607 So.2d at 510.

The 1999 amendments to the contest statute were not intended to change the requirement of proving some substantial illegality by election officials since the plain language required an illegal "rejection of legal votes." FLA. STAT. §102.168(3)(c). Indeed, the legislative history made plain that the Legislature was only trying to codify existing law, not alter it. The Final Legislative

Analysis stated that the 1999 "bill *codifies* the grounds for contesting an election" by, among other things, adding the language of §102.168(3)(c). *See* Fla. H. R. Comm. on Election Reform, HB 281 (1999), Final Analysis (July 15, 1999), at 6, 7 (emphasis added). There is thus absolutely no reason in either the text or legislative history to think the 1999 amendments dropped the substantial noncompliance requirement that has long been necessary to bring a contest under Florida law.

B. The Florida Supreme Court Has Engaged in Wholesale Deviations from the Legislative Directions. The Florida Supreme Court has engaged in a wholesale re-writing of the legislative directions regarding the manner in which elections shall be conducted. Most of the re-writing is based on the Florida Supreme Court's empirical premise — contrary to legislative directions — that "interpretive" manual recounts more accurately reflect the "will of the voters" than counts by well-functioning machines, and that the Legislature could thus never have meant to deny any vote interpreted to exist by such a manual recount. *See Palm Beach County Canvassing Board v. Harris*, 2000 WL 1725434, at *4, 12-13 (Fla.); *Gore v. Harris*, 2000 WL 1801246, at *8-9, 11-12. This empirical premise about accuracy is dubious. Although machine counts doubtless have their inaccuracies, they distribute any error randomly across candidates, and there is no reason to think they are as likely to affect the outcome as the potentially biased errors made in manual counts, especially when the latter are made using shifting or vague standards. In any event, whether empirically accurate or not, the Florida Supreme Court was not entitled to use an empirical premise contrary to that of the Legislature in order to deviate from the legislative directions on the manner in which elections shall be conducted.

But that is precisely what the Florida Supreme Court did here. Because it adopted the contrary premise, it presumed that manual recounts must be allowed in cases where there was no claim that the machines or ballots were defective, but only the claim that manual recounts could interpret ballots more accurately than machine counts. By creating this newfound right to interpretive manual recounts, the Florida Supreme Court also created a "conflict" that otherwise would not have existed between the manual recount provisions and the seven-day statutory deadline, a purported

conflict then used to justify the conclusion that the legislative deadline was ambiguous. *Palm Beach*, *supra*, at *7-8.[6]

Further, the Florida Supreme Court's decision to ignore all the Florida Legislature's statutory deadlines for manual recounts directly resulted from a combination of the court's unwarranted empirical assumption about the enhanced accuracy of interpretive manual recounts and its mistaken policy assumption that more accurate counts must trump any contrary interest in finality. *Palm Beach*, *supra*, at *4, 12-13; *Gore*, *supra*, at *8-9, 11-12,*16-18. In

[6] The Florida Supreme Court also cited a supposed statutory conflict between the "shall" and "may" provisions of FLA. STAT. §§102.111-112. *Palm Beach*, 2000 W.L. 1725434, at *9-10. Relying on the fact that §102.112 was originally enacted later, the court resolved this conflict in favor of the "may" provision. But the court ignored the fact that both statutory provisions have been repealed and re-enacted every other year. *See, e.g.*, Florida Statutes 11.2421, 11.2422 (1999). In each re-enactment, then, the Legislature must have thought the two provisions were consistent. They accordingly should be read to give meaning to both rather than to allow one to repeal the other. The court also ignored the fact that the legislative history of the original adoption of §102.112 shows a clear intent to retain the deadline and mandatory wording of §102.111. Although the Senate had proposed amending §102.111 to extend the deadline from seven to thirteen days and to change the "shall" to a "may", *see* 1989 Senate Journal, p. 819, the House rejected both amendments, *see* 1989 House Journal, p. 1320, and then the Senate agreed to the House version. Chapter 89-338, §30 at 2162, Laws of Florida. The intent of the Legislature in enacting §102.112 was thus not to extend deadlines or create discretion to do so. It was rather merely to codify *Chappell v. Martinez*, 536 So.2d 1007 (Fla. 1988), which provided only that the State Elections Canvassing Commission may include in its certification county returns that were not in the proper form but were timely under §102.111, and did not authorize the Secretary of State or the Commission to delay certification to a later date. This interpretation (or the simple interpretation that §102.111 is a direction and §102.112 is a warning) can make the provisions consistent without, as the Florida Supreme Court did, rendering the Legislature's direction in the "shall" provision of §102.111 meaningless. Since all "shall" provisions are read to avoid absurd results not contemplated by the Legislature, the fact that this "shall" provision would not be enforced in the event of a hurricane does not undermine this interpretation. But the possibility of manual recounts cannot be deemed an event uncontemplated by the Legislature when it set the deadline in the same statute that created the manual recount provisions.

doing so, the Florida Supreme Court has ordered the inclusion of the Broward County manual recount in violation not only of the legislative deadline, but of this Court's remand vacating the Florida court's earlier decision until that court could explain how it could reach such a conclusion without circumscribing the legislative power or putting Florida's electoral votes at risk. Indeed, the Florida Supreme Court required the inclusion of manual recounts from Miami-Dade and Palm Beach County in contravention not only of the statutory deadline, but also of the deadline which that court itself had set in its earlier opinion. *Gore*, *supra*, at *14-18. Finally, the court required new manual recounts in all the other counties even though such manual recounts had never been requested by any party and plainly cannot be finished before December 12. *Id.* at *7-9, 17-18.

In short, the new rule the Florida Supreme Court now wishes to promulgate is not only that manual recounts must always be done in any close election, but that there can never be any deadline for completing such a manual recount. This is a complete reversal of the legislative directions for how elections should be conducted, and it clearly violates Article II of the United State Constitution. All this flows from the court's position that the top priority should not be what the Legislature directed but rather should be completing as broad a manual recount as possible on the dubious empirical and normative assumptions that this better ascertains the will of the voter and matters more than finality.

In its first opinion, the Florida court was quite plain in basing its position on its view of state constitutional law rather than a technical reading of the Legislature's statutory directions.[7]

[7] *Palm Beach*, *supra*, at *15 ("*Because* the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited . . . to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, *misses the constitutional mark. The constitution eschews punishment by proxy*"); *id.* at *11 (""To determine the circumstances under which the Secretary may lawfully ignore returns . . . it is *necessary* to examine . . . constitutional law at both the state and federal levels."); *id.* at 12 ("To the

Chastised by this Court for doing so, the Florida Supreme Court has tried to minimize direct references to the state constitution in its more recent opinion. But the court continued to incorporate that state constitutional principle by reference, repeatedly relying on a case that articulated an intent of the voter standard based on state constitutional law. *Gore*, *supra*, at *8-9, 11 (relying on *Boardman v. Esteva*, 323 So.2d 259, 263 (Fla.1975)). Moreover, the court below has continued to enforce the manual recounts included as a result of its vacated opinion without explaining, as this Court asked it to do on remand, how its requirement that those tardy manual recounts must be accepted could be based on anything other than state constitutional constraints. In any event, the Florida court's imposition of its conception of what best measures the will of the people is hardly rendered more palatable under Article II if that conception is based on these judges' preferred policy rather than on state constitutional law. The important defect is that this conception (whatever its source) deviates from the directions the Legislature itself plainly left in its statutes.[8]

extent that the Legislature may enact laws regulating the electoral process, those laws are *valid only* if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage" guaranteed by the state constitution."); *id.* ("Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote"); *id.* at *13 ("Based on the foregoing [discussion of only state constitutional law], we conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in this opinion."); *id.* ("To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable, unnecessary, and violates longstanding [state constitutional] law."); *id.* ("Technical statutory requirements must not be exalted over the substance of this right" of franchise under state constitutional law.); *id.* at *4 ("the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases"); *id.* ("the will of the people is the paramount consideration . . . to reach the result that reflects the will of the voters, whatever that might be [is our] fundamental principle"). Emphases added throughout.

[8] At many points, the Florida Supreme Court cites statutory sections for its "intent of the voter" test. *Gore*, *supra*, at *9, 11. But here the court seems to conflate the statutory proposition -- which was that, *if* a manual recount should be done and could be completed within statutory deadlines, it should

The Florida Supreme Court's view that all other legislative directions should be subordinated to the court's view about the primacy of manual recounts also led it to several other deviations from the Legislature's carefully crafted scheme. Because the Secretary's opinion and interpretation conflicted with the court's absolutist preference for manual recounts, the Florida court did not follow the statutory provisions making her opinions and interpretations binding on county boards. *See supra.*

The Florida Supreme Court also abandoned the requirement that a contest plaintiff prove substantial noncompliance with law: that is, that the plaintiff has proven, as FLA. STAT. §102.168(3)(c) requires, the illegal rejection of what are legally votes, rather than merely proof of the legal rejection of what legally are non-votes. *See supra.* Thus, the Florida Supreme Court rejected any abuse of discretion review of the board's decision to conduct a manual recount, *Gore*, *supra*, at *6, even though that was plainly part of the statutory scheme and case law interpreting it prior to this election. *See supra.*[9] It also found actionable the entirely proper rejection of votes that were provided after the statutory deadline. The Florida Supreme Court's abandonment of the substantial noncompliance requirement for contests not only deviated from law before the election, but also deviated from that same court's unanimous decision last week in the butterfly ballot case, which rejected plaintiff's claims for failure to prove "substantial noncompliance." *Fladell vs. Palm Beach County Canvassing Bd,*, 2000 W.L. 1763142, at *2 (Fla.)

In effectuating its preference for manual recounts, the Florida Supreme Court has also deviated in multiple ways from the

be conducted pursuant to a clear intent of the voter standard -- with the court's own entirely different proposition that a manual recount done under an intent of the voter standard is always required and preferable to a machine recount no matter the circumstances or deadlines.

[9] If the court meant that a county refusal to do a manual recount is always wrongful when the election is close, that decision plainly contraverts the statutory provisions limiting manual recounts and giving county boards discretion over whether to do them. *See supra.* If the court meant that a non-wrongful county decision could be found actionable in a contest action, then it contraverts the contest statute and the substantial noncompliance test.

statutory conditions for *how* manual recounts may be conducted. The Florida Supreme Court decision now requires that manual recounts be done just for ballots that the machines interpreted as not registering a vote rather than for all ballots counted by these machines. *Gore*, *supra*, at *7. This contravenes the legislative direction in FLA. STAT. §102.166(5)(c), which provides that if a manual recount because of machine error is done, it must be of "all ballots" counted by such machines. Moreover, the Florida Supreme Court ignored the problem that, if machines were misinterpreting ballots, that problem also applied to overvotes, *see Gore*, *supra*, at *20 n.26 (Wells, C.J., dissenting), and to what were otherwise registered as votes. For example, if a hanging chad equals a vote that converts a machine undervote into a legal vote, then it also equals a vote than can convert a single vote into a double vote that makes the ballot invalid. The only way to get a count that consistently applies the same standard for all ballots would thus be manually to count *every* ballot rather than just "undervotes," which is precisely what the Legislature directed.

The Florida Supreme Court has also ordered that manual recount figures must be included even though derived under standards that demonstrably differed between the counties that have already done manual recounts, each of which also differed from the prior practice of not counting chads unless two corners are perforated. *See supra.* The court also orders future counting to be done under standards that are permitted to vary across 64 more counties. These court orders deprive the process of the statutorily required uniformity and bar the Department of State from exercising its statutory duty to assure such uniformity. *See supra*. Such changing, vague, and varying standards also create, as discussed below, severe risks for Florida's electoral voters under 3 U.S.C. §5 and the equal protection clause.

II. The Florida Supreme Court Has Jeopardized Florida's Participation in the Electoral College.

The Florida Supreme Court has jeopardized Florida's participation in the Electoral College in disregard of this Court's prior admonition, clear legislative wishes, and the Florida Supreme Court's own prior decision.

Federal election law provides that a state's election results are not binding on Congress when it counts the electoral results unless all controversies regarding that election are resolved by December 12 and "pursuant to" pre-existing law. 3 U.S.C. §5.

This Court has previously warned the Florida Supreme Court to take into account that "a legislative wish to take advantage of the 'safe harbor' [provided by 3 U.S.C. §5] would counsel against any construction of the Election Code that *Congress* might deem to be a change in law." *Bush*, *supra*, at 6 (emphasis added). As this statement indicates, the question is not whether the majority of the Florida Supreme Court believes that its statutory construction constitutes a change in the law. The question is whether there is a reasonable risk that "Congress might deem" its statutory construction a change in law. Because any State Legislature would have a strong interest in assuring its electoral votes are counted by Congress, this seems to justify a strong canon that the construction of statutes governing Presidential elections must be interpreted to avoid arguable changes in law.

The analysis in Section I clearly establishes the existence of a reasonable risk that Congress might deem the Florida Supreme Court to have altered pre-existing law.[10] Indeed, this risk has been heightened by the sharply divided 4-3 nature of the Florida opinion and the fact that the Florida court's own Chief Justice deems the opinion a clear departure from pre-existing Florida law. *See Gore*, *supra*, at *18 (Wells, C.J., dissenting) ("the majority's decision . . . has no foundation in the law of Florida as it existed on November 7, 2000"); *id.* at *25 (the majority opinion "not only changes a rule

[10] Respondents will presumably reprise their argument that, as long as review by the Florida Supreme Court was provided for by enactments prior to the election, 3 U.S.C. §5 cannot be violated. This contention fails to explain the "pursuant to" or "other methods" language of §5, and is invalid for the other reasons explained in our prior amicus brief. In any event, even if all 3 U.S.C. §5 did require was a prior regime for dispute resolution, that is emphatically *not* what U.S. CONST. ART. II, §1, ¶2 requires. That constitutional clause requires that Electors be appointed in conformance with the directions of the State Legislature. A state supreme court that deviates from those directions thus violates the U.S. Constitution even if some form of judicial review in that court were provided by prior legislative enactments.

after November 7, 2000, but it also changes a rule this Court made on November 26, 2000.")

Finally, even if it did not involve such a clear departure from pre-existing law, the Florida Supreme Court majority opinion would vitiate Florida's safe harbor under 3 U.S.C. §5 because it requires a manual recount that cannot fairly be completed and finally adjudicated before midnight December 11. This not only deviates from the Florida Legislature's wishes, but from the Florida Supreme Court's own prior opinion, which stated that manual recounts should not be counted if they would be "submitted so late that their inclusion will preclude Florida's voters from participating fully in the federal electoral process." *Palm Beach, supra*, at *15. This led the Florida Supreme Court to set a firm deadline of November 26 for all manual recounts, which deadline the court expressly justified as necessary in order to assure completion of all contests before December 12. Yet now the Florida court has ordered further manual recounts (which of course might themselves be contested) in disregard of this weighty concern.

The Florida Supreme Court has regrettably assumed for itself the powers given to the Florida Legislature under the U.S. Constitution. Although the determination of the issues this raises is a political issue best left to the Florida Legislature and Congress, it is plain that today the only way to satisfy 3 U.S.C. §5, and assure that Florida's electoral votes are counted in the electoral college, is for this Court to reverse the Florida Supreme Court and resolve the pending contest. It would be a travesty, after all Florida has been through these past few weeks, for the end result to be that all 6 million voters in Florida might be disenfranchised in the Electoral College.

III. The Decision of the Supreme Court of Florida Risks the Rejection of Florida's Electors by Congress Because the Method it Decreed for Their Selection Violates Equal Protection.

The right to vote is a fundamental right. The disparate treatment of persons or groups of persons in respect to access to the vote, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966),

or in respect to the way in which their vote counts or is counted towards the end for which the election is conducted, *Reynolds v. Sims*, 379 U.S. 870 (1964), must meet the strictest standard of constitutional review. These constitutional constraints apply to the methods by which a State selects Presidential electors. *Williams v. Rhodes*, 393 U.S. 23 (1968).

The decision of the Supreme Court of Florida, if allowed to stand, would set in motion a process that counted or rejected votes on an extremely wide range of standards – full perforation, various degrees of partial perforation, some degree of indentation or dimpling of the area intended to be perforated, counting only consistent dimpling, counting dimples if the voter voted for the candidates of the same party for other offices – all under the capacious and unconstraining rubric of the "intent of the voter." A scheme that assumes and explicitly countenances disparate treatment of this kind need not be shown to be carried out for some sinister or discriminatory purpose (as in *Yick Wo v. Hopkins*, 119 U.S. 536 (1886), or *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985)). It is sufficient that this intentionally disparate treatment is arbitrary and detrimental. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438 (1982) (Blackmun, J. concurring); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).[11]

Of course, this is especially true where a scheme is set up that unjustifiably discriminates between persons in respect to the enjoyment of a fundamental right. Imagine a scheme like the one ordered by the court in this case, but instituted explicitly and in so many words by the State Legislature: "In conducting a manual count of punch card ballots, the counters must determine the intent of the voter. The intent of the voter may (or may not) be discerned only if the perforation is complete, or may (or may not) be inferred from an indentation, however faintly discernible in the vicinity of the chad, or may (or may not) depend on the pattern of indentations or parties of the other candidates voted. The criteria for discerning the intent of the voter shall depend on the county in which the contest

[11] As we have pointed out, the legislative scheme scrupulously adheres to the principle of equality and uniformity in the standards for interpreting ballots during manual recounts. FLA STAT. §101.5609(8) ("standards shall ensure that ballots are counted in a uniform and consistent manner").

takes place – or the precinct, or the identity of the counter, or the time of day." Such a scheme would manifestly violate equal protection. But this was precisely the scheme the court below knowingly instituted in this case. And it is no justification that the court found it difficult or embarrassing to arrive at the specification necessary to render that scheme uniform.

Petitioners phrase their complaint in this regard in terms of a violation of due process as well. In cases such as this, where the law imposes arbitrary distinctions there is not a great difference between that rubric and that of equal protection. Thus *Logan v. Zimmerman Brush*, *supra*, in which the administration of a scheme led to severely disparate treatment for no good reason, was analyzed by four Justices in terms both of equal protection and due process. A similar point holds for the fundamental rights of speech and assembly. Although government may sometimes condition those rights on the obtaining of a license or permission, the grant of authority to the relevant officials may not be so vague and devoid of guidance as to invite arbitrary or discriminatory treatment. "A law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 131 (1992) (internal quotations omitted). No less should be demanded here where officials are charged with determining whether to count votes and which votes to count. Here too, a fundamental right is at stake and there must be "narrow, objective and definite standards" governing the exercise of official discretion. The process the court below set in motion granted the officials administering it a discretion that was broad, subjective and indefinite. If these officials had been charged with issuing parade permits, this Court would not tolerate such standardless discretion. Nor should it tolerate it here, where it affects the right to vote.

The decision below creates a system for counting Presidential votes so replete with arbitrary and unjustifiable distinctions that it violates Equal Protection. Even if a single slate of Presidential electors were appointed pursuant to such a scheme and voted in the Electoral College, there is a significant possibility that such a slate would subsequently be invalidated by the courts, leaving Florida unrepresented in the Electoral College. Or even if

the courts did not step in, Florida risks having any electors so designated rejected by the Congress. Under 3 U.S.C. §15, Congress will only count the voters of electors that have been "regularly given." It is axiomatic that votes given by electors chosen in violation of the Constitution have not been "regularly given," and thus might never be counted.

CONCLUSION

This Court should reverse the decision of the Florida Supreme Court and provide a final determination of contests in this election by midnight December 11, which will assure Florida's Electors are represented in the Electoral College.

Respectfully submitted,

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December 11, 2000
Transcript of Oral Arguments Before the United States Supreme Court, Bush v. Gore

IN THE SUPREME COURT OF THE UNITED STATES

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GEORGE W. BUSH AND :

RICHARD CHENEY, :

Petitioners, : No. 00-949

v. :

ALBERT GORE, JR., ET AL. :

- - - - - - - - - - - - - - - - - - X

Washington, D.C.

Monday, December 11, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of the Petitioner.

JOSEPH P. KLOCK, JR., ESQ., Miami, Florida; on behalf of Respondents Katherine Harris, et al., In support of Petitioner.

DAVID BOIES, ESQ., Armonk, New York; on behalf of Respondents.

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P R O C E E D I N G S

[11:00 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument now on number 00-949, George W. Bush and Richard Cheney, versus Albert Gore, et al. Before we begin the arguments, the Court wishes to commend all of the parties to this case on their exemplary briefing under very trying circumstances. We greatly appreciate it. Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONERS.

MR. OLSON: Mr. Chief Justice, thank you, and may it please the Court:

Just one week ago, this Court vacated the Florida Supreme Court's November 21 revision of Florida's election code, which had changed statutory deadlines, severely limited the discretion of the State's chief election officer, changed the meaning of words such as shall and may into shall not and may not, and authorized extensive standardless and unequal manual ballot recounts in selected Florida counties.

Just four days later, without a single reference to this Court's December 4 ruling, the Florida Supreme Court issued a new, wholesale post-election revision of Florida's election law. That decision not only changed Florida election law yet again, it also explicitly

referred to, relied upon, and expanded its November 21 judgment that this Court had made into a nullity.

QUESTION: Mr. Olson --

QUESTION: Can you begin by telling us our federal jurisdiction, where is the federal question here?

MR. OLSON: The federal question arises out of the fact that the Florida Supreme Court was violating Article II, section 1 of the Constitution, and it was conducting itself in violation of section 5 of Title III of federal law.

QUESTION: On the first, it seems to me essential to the republican theory of government that the constitutions of the United States and the states are the basic charter, and to say that the legislature of the state is unmoored from its own constitution and it can't use its courts, and it can't use its executive agency, even you, your side, concedes it can use the state agencies, it seems to me a holding which has grave implications for our republican theory of government.

MR. OLSON: Justice Kennedy, the Constitution specifically vested the authority to determine the manner of the appointment of the electors in state legislatures. Legislatures, of course can use the executive branch in the states, and it may use in its discretion the judicial branch.

QUESTION: Then why didn't it do that here?

MR. OLSON: It did not do that here because it did not specify -- it did use the executive branch. In fact, it vested considerable authority in the Secretary of State, designating the Secretary of State as the chief elections official, and as we point out, the very first provision in the election code requires the Secretary of State to assure uniformity and consistency in the application and enforcement of the election law. The Secretary of State as the executive branch is also given considerably -- considerable other responsibilities, when but -- and to a certain extent, especially in connection with the contest phase of the election, certain authority was explicitly vested in the Circuit Court of the State of Florida, which is the trial court.

QUESTION: Oh, but you think then there is no appellate review in the Supreme Court of what a circuit court does?

MR. OLSON: Certainly the legislature did not have to provide appellate review.

QUESTION: Well, but it seemed apparently to just include selection of electors in the general election law provisions. It assumed that they would all be lumped in together somehow. They didn't break it out.

MR. OLSON: Well, there are -- there is a

breakout with respect to various aspects of Florida statute and Florida election law. There is a specific grant of authority to the circuit courts. There is no reference to an appellate jurisdiction. It may not be the most powerful argument we bring to this Court.

QUESTION: I think that's right.

MR. OLSON: Because notwithstanding, notwithstanding -- well, the fact is that the Constitution may have been invoked.

QUESTION: Well, this is serious business because it indicates how unmoored, untethered the legislature is from the constitution of its own state, and it makes every state law issue a federal question. Can you use this theory and say that it creates some sort of presumption of validity that allows us to see whether this court or the executive has gone too far? Is that what you're arguing?

MR. OLSON: No, I would say this with respect -- it would have been a perfectly logical, and if you read the statutes, a perfectly logical, especially in the context of a presidential election, to stop this process at the circuit court, and not provide layers of appeal because given the time deadline, especially in the context of this election, the way it's played out, there is not time for an appellate court.

QUESTION: I have the same problem Justice Kennedy does, apparently, which is, I would have thought you could say that Article II certainly creates a presumption that the scheme the legislature has set out will be followed even by judicial review in election matters, and that 3 U.S. code section 5 likewise suggests that it may inform the reading of statutes crafted by the legislature so as to avoid having the law changed after the election. And I would have thought that that would be sufficient rather than to raise an appropriate federal question, rather than to say there's no judicial review here in Florida.

MR. OLSON: I think that I don't disagree with that except to the extent that I think that the argument we presented and amplified on in our briefs is a good argument, it's a solid argument. It is consistent with the way the code is set up, and it's particularly consistent with the timetable that's available in a presidential election. However --.

QUESTION: Well, it's pretty close. You can say it could be interpreted that way by the Florida Supreme Court, I suppose. You think it must be? Or is your point that even in close calls we have to revisit the Florida Supreme Court's opinion?

MR. OLSON: No, I think that it is particularly

in this case where there's been two wholesale revisions, major restructuring of the Florida Election Code, we don't even get close to that question at all. It would be unfortunate to assume that the legislature devolved this authority on its judiciary sub silentio. There is no specific reference to it. But in this case, as we have pointed out, especially the decision of last Friday, there was a major overhaul in almost every conceivable way.

QUESTION: Mr. Olson, as I understand your argument, you rely on Leser v. Garnett and Hawke v. Smith, and is it critical to your Article II argument that we read the word legislature as narrowly, I mean the power granted the legislature as similar to that granted in Article V of the Constitution, as those cases dealt with?

MR. OLSON: No, I don't think it's necessary.

QUESTION: So your reliance on -- you really are not relying on those cases.

MR. OLSON: Well, I think those cases support the argument, but as we said --.

QUESTION: But if you've got to choose one version of the word legislature or the other --.

MR. OLSON: I think in a different context, it's not necessarily the case, and certainly it is true that legislatures can employ the legislative process that might include vetoes by a state chief executive, or a

referendum, when the state deliberately chooses to choose a legislative method to articulate a code. The point I think that's most important and most --.

QUESTION: But is it the choice of the legislature or was it constitutionally limited to this provision? I'm a little unclear on what your theory is. Is it your theory, in other words, that they voluntarily did not permit appellate review of the lower courts in these election contests or that Article II prohibited them from allowing it?

MR. OLSON: No, Article II -- we do not contend that Article II would prohibit them from fulfilling that process.

QUESTION: Of course Article V would have, and under Leser against Garnett and those cases, but you --.

MR. OLSON: In the context of this case we're saying that they can include the judicial branch when they wish to do so, but under no circumstances is it consistent with the concept of the plan in the Constitution for the state, sub siletio, the state legislature sub silentio to turn over to the judiciary the power to completely reverse, revise, and change the election code in all of the major respects --.

QUESTION: Mr. Olson, with respect to the role of judicial review, you rely very much on the McPherson

case, and two things strike me about that case. One is, if you're right on your jurisdiction theory, then should not this Court have vacated instead of affirmed the decision of the Michigan Supreme Court in that case because the Michigan legislature didn't confer upon the Michigan Supreme Court in that case any special authority of judicial review?

MR. OLSON: That's entirely possible that that might be the case, Justice Ginsburg, but the entire text of the McPherson decision and its recitation of the legislative history or the history of legislation and acts by state legislatures to comply with it make it quite clear that the power is vested in the legislature itself.

QUESTION: But there was a decision by the court reviewing, which we affirmed. Under your jurisdiction theory as I see it, there was no role for the Michigan Supreme Court to play because Article II, section 1 gives the authority exclusively to the legislature, and the legislature has not provided for judicial review especially for that measure.

MR OLSON: I think the context of that case is different, and that it's entirely possible for the Court to have come to the conclusion it did in that case and we believe that case is compelling for the principle that we are arguing in this case, that there is no, the entire

structure of what Florida did, its election code, in its effort to comply not only with Article II, but with Section 5 of Title 3, is such that it did not intend in any way to divest itself of the power to determine how the appointment of electors would be determined in a federal presidential election and most importantly, the resolution of cases and controversies, and disputes, with respect to the appointments --.

QUESTION: Three times, at least as I counted in McPherson itself, it refers to what is done by the legislative power under state constitutions as they exist. This is not the most clearly written opinion, and yet three times, they refer to the legislative power as constrained by the state's constitution.

MR. OLSON: And I think that that's important. I agree with you, Justice Ginsburg. It's not the most clearly written opinion. But I think that in the context of that case, the relationship of the legislature to the Constitution in that case and the way that power was exercised, that ought to be reconciled with what we are urging the Court today, that a wholesale revision and abandonment of the legislative authority can't be turned over, especially sub silentio, by a legislature simply because there is a constitution.

There is a constitution in every state. There

is a judiciary in every state. The judiciary performs certain functions in every state, and to go that length, one would assume that the judiciary in every state under that argument could overturn, rewrite, revise, and change the election law in presidential elections notwithstanding Article II, at will.

Now, this was a major, major revision that took place on Friday.

QUESTION: Mr. Olson, isn't that one of the issues in the case as to whether it was a major revision? Your opponents disagree, and I know you rely very heavily on the dissenting opinion in the Florida Supreme Court, but which opinion do we normally look to for issues of state law?

MR. OLSON: Well, I think that the dissenting opinion and the two dissenting opinions are very informative. We are relying on what the court did. If one looks at, for example, the recount provisions, before this revision under Florida law, manual recount under the protest provisions were discretionary, completely discretionary, conducted by canvassing boards during the protest phase of the election, post-election period, pursuant to legislatively defined procedures as to who could be present, for seven days after the election with respect to all ballots in a county, that was mandatory and

only available, as we heard last week, for tabulation error up until this election.

After the decision of December 8th in this context, those remand provisions, I mean those recount, manual recount provisions became mandatory instead of discretionary pursuant to judicial rather than executive supervsion during the contest phase rather than the protest phase, even though it's not even mentioned in the statute with respect to the contest phase, pursuant to ad hoc judicially established procedures rather than the procedures that are articulated quite carefully in the statute.

QUESTION: Well, on ad hoc judicially created procedures, the point of subsection 8 of 168. I mean, once we get into the contest phase, subsection 8 gives at least to the circuit court, leaving aside the question of appellate jurisdiction, about as broad a grant to fashion orders as I can imagine going into a statute.

MR. OLSON: Well, to read that, to read that provision and it's written quite broadly, but to read that, one has to read that in the context of the entire statutory framework. If one reads it the way the Florida Supreme Court did, the entire process is tilted on its head. Where there used to be the decision that was in the election officials, it now becomes in the court. All of

the limitations on the remand process that existed during the protest phase, where the standards should be lower because it's earlier in the process are thrown out the window. The time tables are thrown out the window. The process that exists are there and one has to -- .

QUESTION: What's the timetable in 168?

MR. OLSON: There is no timetable.

QUESTION: That's right. There is no timetable there. So that seems to undercut your timetable argument once you get into the contest phase from the protest phase.

MR. OLSON: But that's only if you untether 168 entirely from the statute and the steam by which the protest phase takes place over a period of seven to 10 days in the context of this election, and the contest phase occurs over the next four weeks.

QUESTION: It may well be and I'll grant you for the sake of argument that there would be a sound interpretive theory that in effect would coordinate these two statutes, 166 and 168, in a way that the Florida Supreme Court has not done. But that's a question of Florida Supreme Court statutory construction and unless you can convince us, it seems to me, that in construing 168, which is what we are concerned with now, and its coordination or lack of coordination with 166, the Florida

Supreme Court has simply passed the bounds of legitimate statutory construction, then I don't see how we can find an Article II violation here.

MR. OLSON: Well, I am hoping to convince you that they passed far beyond the normal limits of statutory construction. The changing of the meaning -- .

QUESTION: You have convinced us certainly that there is a disagreement about how it should be construed, and that disagreement is articulated by the dissents in the most recent case. But I don't quite see where you cross the line into saying that this has simply become a nonjudicial act. It may or may not be good statutory construction, but I don't see it as a nonjudicial act.

MR. OLSON: It is, it is, we submit an utter revision of the timetables, the allocation.

QUESTION: But Mr. Olson, we're back to the -- there is no timetable in 166.

MR. OLSON: That's correct.

QUESTION: And what your argument boils down to, I think, is that they have insufficiently considered 168, I'm sorry, that they have insufficiently considered 166 in construing 168, and you may be right, but you have no textual hook in 168 to say untethered timetables imply in effect a nonjudicial act.

MR. OLSON: We are not just saying timetables.

We are saying that it has wrenched it completely out of the election code which the legislature very carefully crafted to fit together and work in an interrelated fashion. It isn't just the timetable. The fact that there are timetables which are very important in a presidential election, we are today smack up against a very important deadline, and we are in the process where -- .

QUESTION: Yes, you are. But that is a deadline set by a safe harbor statute for the guidance of Congress and it's a deadline that has nothing to do with any text in 168.

MR. OLSON: Well, I believe that the Supreme Court of Florida certainly thought that it was construing, it certainly said so this time, that it was construing the applicability of Section 5 and it was expressing the hope that what it was doing was not risking or jeopardizing the conclusive effect -- .

QUESTION: And it took that into consideration in fashioning its orders under subsection 8.

MR. OLSON: And we submit that it incorrectly interpreted and construed federal law in doing that because what they have inevitably done is provide a process whereby it is virtually impossible, if not completely impossible, and I think it is completely

impossible, to have these issues resolved and the controversies resolved in time for that federal statutory deadline. Furthermore, it is quite clear, we submit, that the process has changed.

QUESTION: Well, if your concern was with impossibility, why didn't you let the process run instead of asking for a stay?

MR. OLSON: Well, because we said -- .

QUESTION: We'd find out.

MR. OLSON: Because we argued, and I believe that there is a very firm basis for saying that that process already had violated Article II of the Constitution. It was also already throwing in jeopardy compliance with Section 5 of Title 3 because the laws had been changed in a number of different respects and we have recited them. The timetables are important.

QUESTION: Oh, and I thought your point was that the process is being conducted in violation of the Equal Protection Clause and it is standardless. MR. OLSON: And the Due Process Clause, and what we know is now the new system that was set forth and articulated last -- .

QUESTION: In respect to that --.

MR. OLSON: Pardon me?

QUESTION: In respect to that, if it were to start up again, if it were totally hypothetically, and you

were counting just undercounts, I understand that you think that the system that's set up now is very unfair because it's different standards in different places. What in your opinion would be a fair standard, on the assumption that it starts up missing the 12th deadline but before the 18th?

MR. OLSON: Well, one fair standard, and I don't know the complete answer to that, is that there would be a uniform way of evaluating the manner in which -- there was Palm Beach, for example --.

QUESTION: All right, a uniform way of evaluating. What would the standard be, because this is one of your main arguments --.

MR. OLSON: Well, the standard -- .

QUESTION: You say the intent of the voter is not good enough. You want substandards.

MR. OLSON: We want -- .

QUESTION: And what in your opinion would be the most commonly used in the 33 states or whatever, or in your opinion, the fairest uniform substandard?

MR. OLSON: Well, certainly at minimum, Justice Breyer, the penetration of the ballot card would be required. Now, that's why I mentioned the Palm Beach standard that was articulated in writing and provided along with the ballot instructions to people voting, that

the chad ought to be punctured.

QUESTION: You're looking at, then, basically Indiana. Is Indiana, in your opinion or pre -- or 1990 Palm Beach, are either of those fair, or what else?

MR. OLSON: It's certainly a starting point, and the --.

QUESTION: Well, would the starting point be what the Secretary of State decreed for uniformity? Is that the starting point --.

MR. OLSON: That is correct.

QUESTION: -- Under the Florida legislative scheme?

MR. OLSON: I would agree with that, Justice O'Connor.

QUESTION: And what standard did the Secretary of State set?

MR. OLSON: She had not set one, and that's one of the objections that we had with respect to the process that -- the selective process that existed and that we discussed in conjunction with the December -- the November 21st position. Not only was there not a standard, but there was a change two or three times during the course of this process with respect to the standard that I was just discussing.

QUESTION: I understand that she has the

expertise and let's assume that under Florida state law she's the one with the presumptive competence to set the standard. Is there a place in the Florida scheme for her to do this in the contest period?

MR. OLSON: I don't think there is. There is no limitation on when she can answer advisory opinions.

QUESTION: Even in the contest period?

MR. OLSON: I don't -- I think that that's correct. Now, whether or not if there was a change as a result of that, of the process, whether there would be problems with respect to section 5 I haven't thought about , but --.

QUESTION: No, if there's --.

QUESTION: If this were remanded --.

QUESTION: Go ahead.

QUESTION: I'm sorry.

QUESTION: If this were remanded to the Leon County Circuit Court and the judge of that court addressed the Secretary of State, who arguably either is or could be made a party, and said please tell us what the standard ought to be, we will be advised by your opinion, that would be feasible, wouldn't it?

MR. OLSON: I think it would be feasible. Now, counsel for the Secretary of State will be up in a moment, immediately after me. As I understand, however, the

election code, she would have the power to respond to that inquiry. In fact, under the very first, as I mentioned, the very first section of the election code, sub 1, she is not only the chief election officer, but has responsibility --.

QUESTION: But I would still like to get your view as to what would be the fair standard.

MR. OLSON: Well, certainly one that would -- I don't -- I haven't crafted it entirely out. That is the job for a legislature.

QUESTION: I would still like to get your opinion insofar as you could give it.

MR. OLSON: I think part of that standard is it would have to be applied uniformly. It would have to be -- I would think a reasonable standard is, would have to be at minimum a penetration of the chad in the ballot, because indentations are no standards at all. There are other procedural standards in the --.

QUESTION: Mr. Olson, was the Palm Beach standard that you referred in your brief applied statewide and uniformly? You refer to the Palm Beach standard having changed. Was the Palm Beach standard ever applied on a statewide basis?

MR. OLSON: I believe it was not, Justice Stevens.

QUESTION: And can we possibly infer from the failure of the Secretary of State to promulgate a statewide standard that she might have inferred that the intent of the voter is an adequate standard?

MR. OLSON: No, I don't think it's a fair inference either way. Remember in response to the question from I think it was Justice Scalia the last time we were here, this is the first time we've had a manual recount for anything other than arithmetic tabulation error. This is something that is unprecedented in the State of Florida. That's another change that took place.

QUESTION: Mr. Olson, you have said the intent of the voters simply won't do, it's too vague, it's too subjective, but at least, at least those words, intent of the voter, come from the legislature. Wouldn't anything added to that be -- wouldn't you be objecting much more fiercely than you are now if something were added to the words that the all powerful legislature put in the statute?

MR. OLSON: Well, I think we have to distinguish between whether we're talking about a prospective uniform standard as opposed to something that changes the process in the middle of the counting and evaluating of disputes. But it certainly would --.

QUESTION: But if we're talking about the

contest period, and the statute, as Justice Souter pointed out, speaks with amazing breadth. It says that "the circuit judge" -- this is the text -- "shall fashion any order he or she deems necessary to prevent or correct any wrong and to provide any relief appropriate under the circumstances". I couldn't imagine a greater conferral of authority by the legislature to the circuit judge.

MR. OLSON: But we submit in the context of the entire election code itself. Now, the intent of the voter standard, the one that's been cited and relied upon by our opponents most, is a provision that's contained in the provision of the election code that deals with damaged or spoiled ballots.

QUESTION: Okay, but we have -- there's no question that the closest we can come now under Florida law is an intent of the voter standard. Is it your position that if any official, judicial or executive, at this point were to purport to lay down a statewide standard which went to a lower level, a more specific level than intent of the voter, and said, for example, count dimpled chads or don't count dimpled chads. In your judgment, would that be a violation of Article II?

MR. OLSON: I don't think it would be a violation of Article II provided that -- I mean, if the first part of your question --.

QUESTION: All right, so --.

MR. OLSON: If we went from the standard that existed before, the dimpled chads, that that had not been a standard anywhere in Florida, if that change was made, we would strongly urge that that would be a violation of Article II.

QUESTION: Mr. Olson --.

MR. OLSON: It would be a complete change.

QUESTION: It is also part of your case, is it not, that insofar as that language just quoted is concerned, the power of the circuit judge to prevent or correct any alleged wrong, it's part of your submission, I think, that there is no wrong when a machine does not count those ballots that it's not supposed to count?

MR. OLSON: That's absolutely correct, Justice Scalia.

QUESTION: The voters are instructed to detach the chads entirely, and the machine, as predicted, does not count those chads where those instructions are not followed, there isn't any wrong.

MR. OLSON: That's correct, they've been euphemistically -- this has been euphemistically referred to as legal votes that haven't been counted. These are ballots where the system created by Florida, both with respect to the initial tabulation and the preferred system

for the recount, the automatic recount in close elections, is to submit those ballots to the same mechanical objective scrutiny that the initial count was done, and those were not counted either because there were votes for more than one candidate, which would make them overvotes, I guess they're calling them, or that they read as no vote, which many people do, many people do not vote in the presidential election even though they're voting for other offices.

QUESTION: But as to the undervotes, and as to the undervotes in which there is arguably some expression of intent on the ballot that the machine didn't pick up, the majority of the Florida Supreme Court says you're wrong. They interpreted the statute otherwise.

Are you saying here that their interpretation was so far unreasonable in defining legal vote as not to be a judicial act entitled, in effect, to the presumption of reasonable interpretation under Article II?

MR. OLSON: Yes, that is our contention, and that has to be done. That contention is based upon everything else in the Florida statute, including the contest provisions. The manual recount provisions --.

QUESTION: What is it in the contest provision that supports the theory that that was a rogue, illegal judicial act?

MR. OLSON: Because there is no reference to them, even though that process is referred to --.

QUESTION: There's no definition. There's no definition. Doesn't the court have to come up with a definition of legal votes?

MR. OLSON: In the context, in the context of the statute as a whole, manual recounts are treated quite extensively as a last resort for tabulation error at the discretion of canvassing officials.

QUESTION: At the protest stage?

MR. OLSON: That's correct.

QUESTION: Mr. Olson --.

MR. OLSON: We submit -- and I would like to reserve the balance of my time.

QUESTION: Mr. Olson, is it critical to your position that the Florida Supreme Court erred in its resolution of the shall/may controversy in its first opinion?

MR. OLSON: I'm sorry, I missed --.

QUESTION: Is it critical to your position, because you're tying the two cases together, that the Florida Supreme Court made that kind of error in its resolution of the conflict between shall and may in the disparate statute?

MR. OLSON: I don't think it's critical. What

we're saying is that the court expanded upon its previous decision that was vacated in this case, it used the time period that it opened up to do this manual recount to then build upon in the December 8th opinion.

QUESTION: Very well, Mr. Olson. Mr. Klock, we'll hear from you.

ORAL ARGUMENT OF JOSEPH P. KLOCK, JR.

ON BEHALF OF RESPONDENTS KATHERINE HARRIS, ET AL., IN SUPPORT OF PETITIONERS.

MR. KLOCK: Mr. Chief Justice, and may it please the Court:

If I could start by addressing a question of Justice Souter with respect to the standards, 166 does have time limits. The time limit of 166 is set by the certification, which is seven days after the election. The time of the contest, there are time limits there as well. You have ten days to file a complaint, ten days to file an answer, and in the context of a presidential election, you then of course have the December 12 deadline.

So therefore, there are time --

QUESTION: Which is federal, not state, and occurs in the safe harbor statute, or as a result of the safe harbor statute.

MR. OLSON: Yes, Your Honor, but this Court in

its opinion that it handed down in the initial Harris case pointed out that it was clear that there was a desire in which by the legislature to preserve the safe harbor.

QUESTION: Oh, there is no -- .

QUESTION: I thought the Florida court accepted that, too, in its current opinion.

MR. KLOCK: They did say that exactly, Your Honor.

QUESTION: Mr. Klock, will you -- you refer to the first Harris case. We think of it as the first Bush v. Gore case. You are talking about the same -- .

MR. KLOCK: Yes, Your Honor.

QUESTION: Mr. Klock, will you address Justice Breyer's question of a moment ago, if there were to be a uniform standard laid down, I suppose at this point by the Leon County Circuit Court or in any other valid way in your judgment, what should the substantive standard be?

MR. KLOCK: I'll try to answer that question. You would start, I would believe, with the requirements that the voter has when they go into the booth. That would be a standard to start with. The voter is told in the polling place and then when they walk into the booth that what you are supposed to do with respect to the punch cards is put the ballot in, punch your selections, take the ballot out, and make sure there are no hanging pieces

of paper attached to it. The whole issue of what constitutes a legal vote which the Democrats make much ado about presumes that it's a legal vote no matter what you do with the card. And presumably, you could take the card out of the polling place and not stick it in the box and they would consider that to be a legal vote. The fact is that a legal vote at the very basics has to at least be following the instructions that you are given and placing the ballot in the box.

QUESTION: No, we're asking, I think --.

MR. KLOCK: No.

QUESTION: Not what the Florida election law is at this point in your opinion, but rather if under the Equal Protection Clause, and I'm drawing on your experience as a person familiar with elections across the country. You have looked into this.

MR. KLOCK: Yes, sir.

QUESTION: What would be a fair subsidiary standard applied uniformly, were it to be applied uniformly across all the counties of Florida, including Broward, a fair uniform standard for undervotes. Remember, Indiana has a statute, Michigan has a statute, 33 states have a statute where they just say intent of voter, but in your opinion because of the hanging chad, etc., etc., what is a fair, not necessarily Florida law,

but a fair uniform standard?

MR. KLOCK: Without being disrespectful, Your Honor, I think you have answered the question in terms of phrasing the question. There are any number of statutory schemes that you could select from if you were a legislature, but as a court, I don't think that the Supreme Court of Florida respectfully, or any other court can sit down and write the standards that are going to be applied. If you are a legislature --.

QUESTION: But in your opinion, if you were looking for a basically fair standard, to take one out of a hat, Indiana, or Palm Beach 1990, in your opinion would be a basically fair one?

MR. KLOCK: If I were to take one out of a hat, Your Honor, if I was a legislature, what I would do is I would hold that you have to punch the chad through on a ballot. In those situations where you have a ballot where there are only indentations in every race, you might then come up with a different standard, but the only problem that we have here is created by people who did not follow instructions.

QUESTION: Okay. Can I ask you a different question on Florida law?

MR. KLOCK: Yes, sir.

QUESTION: And the question on Florida law is

simply this, what the statute is. I take it the contest statute lists grounds for contesting, one of those grounds is rejecting a sufficient number of legal votes sufficient to place the election in doubt, and then the circuit judge is given the power to investigate that allegation, just to look into it.

MR. KLOCK: Yes. There were no --.

QUESTION: So why would it be illegal under Florida law to have a recount just to investigate whether this allegation is or is not so?

MR. KLOCK: The Justice's question assumes that they are legal votes.

QUESTION: There might be some in there that are legal under anybody's standard.

MR. KLOCK: Your Honor, if they are not properly, if the ballot is not properly executed, it's not a legal vote. The only case in Florida that even touches upon this in terms of a machine ballot is the Hogan case from the Fourth District Court of Appeal. In the Fourth District Court of Appeal, that candidate lost by three votes, and he went during the protest phase to the canvassing board and asked for a manual recount to be done and they exercised their discretion and said no. And in that case, there is a discussion. He raised the argument that there were ballots in there that had hanging chads

and this that and the other thing. They would hear none of it and when it went up on appeal, it was affirmed. So the fact of the matter is that the only case that we have that deals with this handles it in that fashion, and I would respectfully suggest that a ballot that is not properly punched is not a legal ballot.

And I think also, sir, if you go through an analysis of the Vice President's arguments in supporting what the Supreme Court does, there is sort of an omelet that is created by going and picking through different statutes.

For instance, the clear intent standard comes from a statute that deals with a damaged ballot where you have to create, to put through the machine, a substitute ballot, and there are very clear directions as to what to do to preserve the integrity of the ballot. And the Beckstrom case, which you will no doubt hear much about as the argument proceeds, dealt with that kind of situation. There was a manual recount there; the court did not pass on the propriety of it. The issue was if the election officials took ballots and marked over the ballots instead of creating a separate substitute ballot, they took that ballot and marked it over so it could go through an optical scanner, which the court found to be gross negligence whether they would discount the votes. That

was the issue that was present there. So I think if you look through Florida law it is relatively clear that there was no basis whatsoever to be able to find -- .

QUESTION: Let me just ask this question. If you did have a situation, I know your position is different, where there were some uncounted ballots due to a machine malfunction, for example, would it not make sense to assume that the standard used for damaged ballots would be the same standard you use in that situation?

MR. KLOCK: I don't think so, sir.

QUESTION: What standard would you use in the situation I propose, then?

MR. KLOCK: Well, Justice Brennan, the difficulty is that under -- I'm sorry. That's why they tell you not to do that.

The standard that is in 166 is in, is dealing with the protest phase, and it was brought about in 1988.

QUESTION: I understand, but my question is if you don't use that standard, what standard would you use for my hypothetical?

MR. KLOCK: The legislature would have to create one, sir. I don't know what standard -- .

QUESTION: You are saying that they can't interpret a statute in which there is no explicit definition.

MR. KLOCK: What I'm saying is -- .

QUESTION: They have to throw their hands up?

MR. KLOCK: No. Justice Breyer, what I'm saying is that -- .

QUESTION: I'm Justice Souter -- you'd better cut that out.

MR. KLOCK: I will now give up. What I'm saying, sir, is this. That you cannot be in a situation of using the word interpret to explain anything that a court does. The word interpret cannot carry that much baggage.

QUESTION: But you go to the opposite extreme and say, it seems to me, that they cannot look, as Justice Stevens suggested, to a statute which deals with, and certainly a closely analogous subject at a near stage, and it seems to me that you in effect go to the opposite extreme that you are excoriating the Florida Supreme Court for and say they can't interpret at all.

MR. KLOCK: I think what the Florida Supreme Court should do in that instance is note the very tight restrictions that exist under the protest phase. They require that you find voter intent with respect to a damaged ballot. They also vested in the canvassing board, and the canvassing board is composed of a certain, a defined group of officials, a county judge, the election

supervisor, the chairman of the county commission, it is very limited.

QUESTION: But that means the court apparently cannot define legal vote.

MR. KLOCK: That's correct.

QUESTION: Mr. Klock -- I'm Scalia.

MR. KLOCK: Yes, sir. I remember that. You correct me. It will be hard to forget.

QESTION: Correct me if I'm wrong, but I had thought that although you don't take into account improperly marked ballots for purposes of determining whether there will be a manual recount, I had thought that when there is a manual recount for some other reason, and you come across ballots of this sort that you can count them, that for that purpose you can decide oh, look at, there is a hanging chad. The machine didn't count it. It's clear what the intent of the voter are. We'll count it. Is that not correct?

MR. KLOCK: Yes. Justice Scalia, that is correct. If you have a situation -- .

QUESTION: It's correct if you use the intent of the voter standard in that situation?

MR. KLOCK: Pardon me, sir?

QUESTION: It's correct that you use the intent of the voter situation, standard in that situation?

That's what I understand the answer to be.

MR. KLOCK: It is correct that that statute provides. That I think that that statute, there could be problems under it, but that statute was designed for a very limited situation where there was a problem with the mechanism of voting. It was not designed to handle voter error and that is absolutely clear because otherwise, Your Honor, what would occur is the following. That in every election that have you that was close, you would have an automatic recount and then irrespective of what the canvassing board does, just load all the ballots together and put them on a truck and send them to Tallahassee because if there is no standard whatsoever and in any election contest that you are unhappy with the election, you can send the ballots to Tallahassee, then have you a problem that is created that would not exist -- .

QUESTION: Thank you, Mr. Klock.

Mr. Boies, we'll hear from you.

ORAL ARGUMENT OF DAVID BOIES

ON BEHALF OF THE RESPONDENTS.

MR. BOIES: Thank you, Mr. Chief Justice, may it please the court.

Let me begin by addressing what happened in the Beckstrom case that Mr. Klock refers to.

QUESTION: Could we begin with jurisdiction,

first?

MR. BOIES: Yes.

QUESTION: The Supreme Court of Florida said that it took, that it was cognizant, and the legislature was cognizant of 3 U.S.C. Section 5. And for convenience sake, let's call that new law. That's not exactly the --

QUESTION: When the Supreme Court used that word, I assume it used it in a legal sense. Cognizance means to take jurisdiction of, to take authoritative notice. Why doesn't that constitute an acceptance by the Supreme Court of the proposition that 3 USC section 5 must be interpreted in this case?

MR. BOIES: I think, Your Honor, and obviously this Court and the Florida Supreme Court is the best interpreter of that opinion, but I think a reasonable interpretation of that opinion is to say that what the Florida Supreme Court meant by cognizant is that it was taking into account the desire to get the election over in time so that everyone would have the advantage of the safe harbor. I think that goes throughout the opinion.

QUESTION: Well, the language used in 3 USC section 5 is garden variety language so far as the courts are concerned. We can determine whether or not there is a new law or an old law. That's completely susceptible of judicial interpretation, is it not?

MR. BOIES: Yes, I think it is, Your Honor.

QUESTION: All right. And it seems to me that if the Florida court, and presumably the Florida legislature have acted with reference to 3 USC section 5 that it presents now a federal question for us to determine whether or not there is or is not a new law by reason of the various Florida supreme -- two Florida Supreme Court decisions.

MR. BOIES: Except, Your Honor, what the Florida Supreme Court did I think in its opinion is to say that in terms of looking at how to remedy the situation, it needed to be cognizant of the fact that there was this federal deadline out there that was going to affect Florida's electors if that deadline was not met.

QUESTION: Well, of course the deadline is meaningless if there's a new law involved. That's part of the equation, too.

MR. BOIES: Yes, but what I would say is that whether or not there is a new law, that is whether there's a change in the enactment in the language of the statute or the constitution, is something that has to be decided in the initial instance by the Florida Supreme Court interpreting Florida law.

QUESTION: There really -- Mr. Boies, there are really two parts to that sentence of section 5 we're

talking about. One is the law in effect at the time and the other is finally determined six days before the date for choosing the electors. Do you think the Florida court meant to acknowledge -- it seems to me since it's cited generally, they must have acknowledged both of those provisions.

MR. BOIES: I don't know exactly what was in the Florida Supreme Court's mind, but I think that in general what the Florida Supreme Court made quite clear is that the thing that was constraining it was the desire to fit its remedy within the safe harbor provision.

QUESTION: So that's the finally determined portion of section 5?

MR. BOIES: Yes, Your Honor, yes, I think that's right. And I think it does not reflect a desire to change the law or in any way affect what the substantive law is. What the court is saying is --.

QUESTION: Let me ask, could the legislature of the State of Florida, after this election, have enacted a statute to change the contest period by truncating it by 19 days?

MR. BOIES: You mean by shortening it?

QUESTION: Without contravening the section which says that there should be no new law for the safe harbor? Could the Florida Supreme Court have done what

the -- could the Florida legislature have done what the supreme court did?

MR. BOIES: I think that it would be unusual. I haven't really thought about that question. I think they probably could not --.

QUESTION: Consistently, because that would be a new law under section 5, wouldn't it?

MR. BOIES: Yes, because it would be a legislative enactment as opposed to a judicial interpretation of an existing law. Remember --.

QUESTION: And in fact it would be a new law under our pre-clearance jurisprudence, wouldn't it?

MR. BOIES: I think not, Your Honor, because if you go back to the State against Chappell in 1988, where the Florida Supreme Court faced the very question of whether or not that seven-day period was an iron curtain that came down, the Florida Supreme Court said it was not. The Florida Supreme Court said that you had to look as to whether there was substantial compliance. In that case three days was found to be substantial compliance. That was a situation in which there was telephone notice, which was not adequate for certification. That was then followed up --.

QUESTION: But if we assume the legislature would run contrary to the new law prohibition in the

statute, wouldn't the Supreme Court do it if it does exactly the same thing?

MR. BOIES: Except what I'm saying, Your Honor, is that it wasn't doing exactly the same thing because it wasn't passing a new law. It was interpreting the existing law. If the legislature had said, for example the legislature --.

QUESTION: I'm not sure why -- if the legislature does it it's a new law and when the supreme court does it, it isn't. Both would have to require -- you have to pre-clear judicial rulings and see whether they make new laws, don't you?

MR. BOIES: What I'm saying, Your Honor, is that if the supreme court had rewritten the law the way you hypothesized the legislature rewrote the law, it might very well be a difference. What I'm saying is that the Florida Supreme Court did not rewrite the law in the way that you hypothesized. What the Florida Supreme Court was confronted with was a statute, and that statute said that -- and it was the later passed statute, we get back into the may and the shall.

The may statute was the later passed statute, and so what the Florida Supreme Court said is we have to look at what is the criteria by which you decide whether you may ignore and will ignore these returns, and what the

Florida Supreme Court said, we're going to interpret that exactly the way we've interpreted it for 25 years, and 12 years before the Florida Supreme Court made this decision, it had made the State against Chappell decision in which it had approached it from exactly the same policy grounds.

QUESTION: Well, it was quite a different -- I mean, there, indeed, telephone notification had been given within the deadline, and the actual written material was not submitted until a few days after. I think that's quite a bit different from extending the period generally and for all submissions for, you know -- but if I could -- I'm not sure that you and Justice Kennedy are disagreeing on very much. It seems to me you acknowledge that if the Florida Supreme Court's interpretation of this law were not a reasonable interpretation, just not one that would pass normal judicial muster, then it would be just like the legislature writing a new law, but your contention here is that this is a reasonable interpretation of Florida law.

MR. BOIES: I think the way I would put it, Your Honor, is that if you conclude that the Florida Supreme Court's interpretation of Florida law is either a sham or it is so misguided that it is simply untenable in any sense --.

QUESTION: Right.

MR. BOIES: I think at that point then you can conclude that what it has done is it has changed the law, but I think the standard is the standard this Court has generally applied in giving deference to state supreme court decisions.

QUESTION: But is it in light of Article II? I'm not so sure. I mean, I would have thought that that bears on the standard, frankly, when it contemplates that it is plenary power in the legislature. Does that not mean that a court has to, in interpreting a legislative act, give special deference to the legislature's choices insofar as a presidential election is concerned? I would think that is a tenable view anyway, and especially in light also of the concerns about section 5.

MR. BOIES: I think, Your Honor, that if the Florida Supreme Court in interpreting the Florida law, I think the Court needs to take into account the fact that the legislature does have this plenary power. I think when the Florida Supreme Court does that, if it does so within the normal ambit of judicial interpretation, that is a subject for Florida's Supreme Court to take.

QUESTION: You are responding as though there were no special burden to show some deference to legislative choices. In this one context, not when courts review laws generally for general elections, but in the

context of selection of presidential electors, isn't there a big red flag up there, watch out?

MR. BOIES: I think there is in a sense, Your Honor, and I think the Florida Supreme Court was grappling with that.

QUESTION: And you think it did it properly?

MR. BOIES: I think it did do it properly.

QUESTION: That's, I think, a concern that we have, and I did not find really a response by the Florida Supreme Court to this Court's remand in the case a week ago. It just seemed to kind of bypass it and assume that all those changes and deadlines were just fine and they would go ahead and adhere to them, and I found that troublesome.

MR. BOIES: Your Honor, if I could, one of the things that was argued from the beginning by Governor Bush's counsel and accepted by the Florida Supreme Court was that the protest statute and the contest statute were very separate procedures. There was a time limit in the protest contest prior to certification, but there is no time limit in the contest statute process, which is what we are in now, and I think that the Florida Supreme Court was focusing on this contest period, which is what is really before, was before them and is before you, and in the contest --

QUESTION: But I thought, and maybe I'm mistaken, but I thought it directed that certain votes that had been tabulated after the expiration of the original certification date were to be included now without reference to the point at all that their opinion had been vacated. I just didn't know how that worked.

MR. BOIES: Well, there are three different groups of votes, okay? And with respect -- Broward, Palm Beach, and Miami-Dade. With respect to Miami-Dade and Palm Beach, there was a trial. There was a contest trial. It is the appeal from that trial that is before this Court. And the petitioners don't really refer to what's in the trial record but in that trial record, there was undisputed evidence that the votes that were counted there were valid legal votes. Now, whether those votes were counted as part of the certification process or not --.

QUESTION: This was a --.

MR. BOIES: Once you know they are valid votes -- .

QUESTION: This was a trial, Mr. Boies, in the circuit court of Miami-Dade?

MR. BOIES: Yes. No. In the Circuit Court of Leon County. Because it's a statewide election, the contest procedure takes you to Leon County, regardless of where the votes are cast. But what the, what the, what

the court found there, and there was undisputed evidence, and Mr. Richard, who was Governor Bush's counsel here, conceded that the Palm Beach Board had applied the appropriate standard in identifying votes, the so-called 215 additional net votes for Vice President Gore and Senator Lieberman. What you had there was undisputed evidence, it was found as a matter of fact, and the Supreme Court reviewing that trial said you've had these votes identified by Miami-Dade, 168 net votes, by Palm Beach, 215 net votes, and those votes need to be included. Not because -- .

QUESTION: It not only said --.

MR. BOIES: -- It's a part of the certification process.

QUESTION: It not only said that. It said that those votes have to be certified.

MR. BOIES: Yes, Your Honor.

QUESTION: It said that those votes had to be certified, which certainly contravenes our vacating of their prior order.

MR. BOIES: I think not, Your Honor, because when you look at the contest statute, it is a contest of the certification. That is, the process is the results are certified and then what happens is you contest whether that certification is right.

QUESTION: I understand, but this, but what the Florida Supreme Court said is that there shall be added to the certification these additional numbers.

MR. BOIES: But that's true in any contest. Every single contest -- .

QUESTION: It's not added to the certification.

MR. BOIES: Yes, of course it is, Your Honor.

QUESTION: You may do review of the ballots and add more numbers, but as I read the Florida Supreme Court opinion, it said the Secretary of State will certify these additional --.

MR. BOIES: Yes. Because the contest procedure is a procedure to contest the certification. What you are doing is you are saying this certification is wrong. Change it. That's what every contest proceeding is. And what the Florida Supreme Court was saying after this trial is yes, you proved that this certification is missing 250 votes.

QUESTION: The certification as rendered by the Secretary of State did not include those additional ballots for your client, and the Supreme Court directed that the certification would be changed to include those.

MR. BOIES: But, but Your Honor, that is what happens every time there is a successful contest. The contest is a contest of the certification. You have the

certification results first.

QUESTION: It doesn't make any sense to me. You have a certification which is made by the Secretary of State. That is what is contested.

MR. BOIES: Right.

QUESTION: And here the certification was directed to be changed. Let -- .

QUESTION: By the way, does it matter if they said in Palm Beach and, Palm Beach and Miami-Dade, the ones that the court said you must certify, if they were thrown into the other, said recount them. If it's uncontested in the trial, I guess that you would get to the same place.

MR. BOIES: I think you get to exactly the same place.

QUESTION: So it doesn't really matter.

MR. BOIES: I think it doesn't really matter what they said.

QUESTION: But Broward might?

MR. BOIES: But Broward might.

QUESTION: Would you object if they have a different standard to recounting those?

MR. BOIES: Broward is a different situation.

QUESTION: Yes.

MR. BOIES: With respect to Broward, what you

have is you have these votes that have been counted, and were included in the certification, and if were you to assume that that certification that came in on November 26th is somehow void, then those ballots would have to be considered just like the Dade and Palm Beach ballots, so I think there is a distinction between Broward and -- .

QUESTION: Do you think that in the contest phase, there must be a uniform standard for counting the ballots?

MR. BOIES: I do, Your Honor. I think there must be a uniform standard. I think there is a uniform standard. The question is whether that standard is too general or not. The standard is whether or not the intent of the voter is reflected by the ballot. That is the uniform standard throughout the State of Florida.

QUESTION: That's very general. It runs throughout the law. Even a dog knows the difference in being stumbled over and being kicked. We know it, yes.

In this case -- in this case what we are concerned with is an intent that focuses on this little piece of paper called a ballot, and you would say that from the standpoint of equal protection clause, could each county give their own interpretation to what intent means, so long as they are in good faith and with some reasonable basis finding intent?

MR. BOIES: I think -- .

QUESTION: Could that vary from county to county?

MR. BOIES: I think it can vary from individual to individual. I think that just as these findings -- .

QUESTION: So that, so that even in one county can vary from table to table on counting these ballots?

MR. BOIES: I think on the margin, on the margin, Your Honor, whenever you are interpreting intent, whether it is in the criminal law, an administrative practice, whether it is in local government, whenever somebody is coming to government --.

QUESTION: But here you have something objective. You are not just reading a person's mind. You are looking at a piece of paper, and the supreme courts in the states of South Dakota and the other cases have told us that you will count this hanging by two corners or one corner, this is susceptible of a uniform standard, and yet you say it can vary from table to table within the same county.

MR. BOIES: With respect, it is susceptible of a more specific standard, and some states, like Texas, have given a statutory definition, although even in Texas, there is a catch-all that says anything else that clearly specifies the intent of the voter. So even, even where

states have approached this in an attempt to give specificity, they have ended up with a catch-all provision that says look at the intent of the voter.

QUESTION: But they have ended up with a catch-all provision because I assume there may be cases in which the general rule would otherwise operate in which there is an affirmative counter indication to what the general rule would provide, but I think what's bothering Justice Kennedy and it's bothering a lost us here is we seem to have a situation here in which there is a subcategory of ballots in which we are assuming for the sake of argument since we know no better that there is no genuinely subjective indication beyond what can be viewed as either a dimple or a hanging chad, and there is a general rule being applied in a given county that an objective intent or an intent on an objective standard will be inferred, and that objective rule varies, we are told, from county to county. Why shouldn't there be one objective rule for all counties and if there isn't, why isn't it an equal protection violation?

MR. BOIES: Let me answer both questions. First, I don't think there is a series of objective interpretations, objective criteria that would vary county by county.

QUESTION: All right. But on the assumption

that there may be, if we were fashioning a response to the equal protection claim, and we assume as a fact that there may be variations, wouldn't those variations as, from county to county, on objective standards, be an equal protection violation?

MR. BOIES: I don't think so. I don't think so, Your Honor, because I think there are a lot of times in the law in which there can be those variations from jury to jury, from public official to public official.

QUESTION: Yes, but in jury to jury cases, we assume that there is not an overall objective standard that answers all questions definitively. We are assuming that there is detail that cannot be captured by an objective rule.

The assumption of this question, and I think, I think it's behind what's bothering Justice Kennedy, Justice Breyer, me and others, is, we're assuming there's a category in which there just is no other -- there is no subjective appeal. All we have are certain physical characteristics. Those physical characteristics we are told are being treated differently from county to county. In that case, where there is no subjective counter indication, isn't it a denial of equal protection to allow that variation?

MR. BOIES: I don't think, I don't think so,

Your Honor, because -- and maybe I am quarreling with a premise that says there are these objective criteria. Maybe if you had specific objective criteria in one county that says we're going to count indented ballots and another county that said we're only going to count the ballot if it is punched through. If you knew you had those two objective standards and they were different, then you might have an equal protection problem.

QUESTION: All right, we're going to assume that we do have that. We can't send this thing back for more fact finding. If, if we respond to this issue and we believe that the issue is at least sufficiently raised to require a response, we've got to make the assumption, I think at this stage, that there may be such variation, and I think we would have a responsibility to tell the Florida courts what to do about it.

On that assumption, what would you tell them to do about it?

MR. BOIES: Well, I think that's a very hard question.

QUESTION: You would tell them to count every vote. We're telling them to count every vote.

MR. BOIES: I would tell them to count every vote.

QUESTION: Let me ask you, before you answer

that question, Mr. Boies --.

MR. BOIES: I think, I think I would say that if you're looking for a standard, and I say that not because of the particular aspects of this election -- the Texas standard, if you wanted to specify something that was specific, gives you a pretty good standard.

QUESTION: Let me ask you this question, Mr. Boies. Is it really, does not the procedure that is in place there contemplates that the uniformity will be achieved by having the final results all reviewed by the same judge?

MR. BOIES: Yes, that's what I was going to say, Your Honor, that what you have here is you have a series of decisions that people get a right to object to is all going through a process, the people are there. They submit written objections, and then that's going to be reviewed by a court.

QUESTION: Well, all right. That causes me some problems that pertain not just to the equal protection aspect of this, but to the rationality of the supreme court's opinion, because the supreme court opinion on the one hand said, as you've just repeated, that there was to be de novo review by the circuit judge in Leon County. But on the other hand, it said that he had to accept the counts that had come out of Palm Beach and Broward

counties.

It was clear that Broward and Palm Beach counties had applied different criteria to dimpled ballots. One of them was counting all dimpled ballots, the other one plainly was not. How can you at one and the same time say it's a de novo standard as to what is the intent of the voter, and on the other hand say, you have to accept, give some deference to, quite differing standards by two different counties? That's just not rational.

MR. BOIES: Your Honor, I think what the court held was not include both Broward and Palm Beach. I think it was Palm Beach and Miami-Dade, because Broward was not part of the trial because Broward had been certified, and with respect to Miami-Dade and Palm Beach, I do not believe that there is evidence in the record that that was a different standard. I don't -- and there's no finding at the trial court that that was a different standard. Indeed, what the trial court found was that both Miami-Dade and Palm Beach properly exercised their counting responsibilities, so I don't think --.

QUESTION: What do you mean? Properly exercised what? Their discretion, right? Is that what he meant by counting responsibilities?

MR. BOIES: I believe what he meant, it was

discerning the clear intent of the voter, which is what they were both attempting to do.

QUESTION: Was this the trial before Judge Sauls?

MR. BOIES: Yes, Your Honor.

QUESTION: I thought he ruled against the contestants, said they took nothing.

MR. BOIES: Yes, that is, that is right, but he did so based on what the Florida Supreme Court held, and what six justices of the Florida Supreme Court held were two errors of law. First, that we had to prove before he looked at the ballots that there was a probability that the election result would be changed, and second, that we had to prove abuse of discretion.

QUESTION: But the fact-finding phase of that trial would be from -- you say these were found as a fact in some -- did he make findings of fact?

MR. BOIES: Yes, he did.

QUESTION: What did he say with respect to this?

MR. BOIES: With respect to this he said -- he said it separately with respect to Miami-Dade and Palm Beach. Because he found that they had properly exercised their discretion. The Palm Beach chairman of the canvassing board actually was a witness, Judge Burton. He came and testified, and he testified that they used a

clear intent of the voter standard.

QUESTION: As opposed to just intent of the voter?

MR. BOIES: Yes, just intent. They used clear intent of the voter. And the statute, sometimes, in one section says clear intent of the voter. That's the one that Petitioners' counsel is referring to. In 166, it refers in subsection 7(b) to the intent of the voter, but Palm Beach used the clear intent of the voter and found hundreds of ballots that they could discern the clear intent of the voter from that were not machine read.

Now, in doing so, they were applying Florida law, and like the law of many states, it has a general standard, not a specific standard.

QUESTION: Were those dimpled or hanging chads, so to speak?

MR. BOIES: Well, what he testified is that you looked at the entire ballot, that if you found something that was punched through all the way in many races, but just indented in one race, you didn't count that indentation, because you saw that the voter could punch it through when the voter wanted to. On the other hand, if you found a ballot that was indented all the way through, you counted that as the intent of the voter.

QUESTION: With no holes punched?

MR. BOIES: With no holes punched, but, but where it was indented in every way.

QUESTION: That was counted as proper in --.

MR. BOIES: In Palm Beach.

QUESTION: Palm Beach.

MR. BOIES: Another, another thing that they counted was he said they discerned what voters sometimes did was instead of properly putting the ballot in where it was supposed to be, they laid it on top, and then what you would do is you would find the punches went not through the so-called chad, but through the number.

QUESTION: Well, why isn't the standard the one that voters are instructed to follow, for goodness sakes? I mean, it couldn't be clearer. I mean, why don't we go to that standard?

MR. BOIES: Well, Your Honor, because in Florida law, since 1917, Darby against State, the Florida Supreme Court has held that where a voter's intent can be discerned, even if they don't do what they're told, that's supposed to be counted, and the thing I wanted to say about the Beckstrom case is that was a case that used optical ballots. Voters were told, fill it in with a number two pencil. Several thousand didn't. They used everything else, but not a number two pencil. And so the machine wouldn't read it. It was voter error.

The Supreme Court in 1998, well before this election, said you've got to count those votes. And in fact, they counted those votes even though the way the canvassing board dealt with them was to go back and mark them over with a big black marker, which made it impossible to check whether the canvassing board had really just marked over the ballot or had put a new mark on the ballot.

QUESTION: Mr. Boies, can I come back to this discrepancy between Palm Beach and Broward County? I'm reading from footnote 16 of the Florida Supreme Court's opinion. On November 9, 2000, a manual recount was requested on behalf of Vice President Gore in four counties -- miami-Dade, Broward, Palm Beach, and Volusia. Broward County and Volusia County timely completed a manual recount. It is undisputed that the results of the manual recounts in Volusia County and Broward County were included in the statewide certifications.

MR. BOIES: Yes, Your Honor.

QUESTION: And those statewide certifications the Supreme Court ordered to be accepted. So it is -- the Supreme Court, while applying a standard of supposedly de novo review of the certifications, is requiring the Circuit Court to accept both Broward County, which does one thing with dimpled ballots, and Palm Beach County,

which does something clearly different.

MR. BOIES: Your Honor, the de novo review is in the contest phase, and neither Volusia County nor Broward County was a contest filed. What the Supreme Court holds is that you've got de novo review in a contest. A contest relates to specific ballots that are contested. The ballots in Broward and Volusia were not contested by any party.

QUESTION: But the determination that the circuit court has to make about whether it's necessary to have a recount is based upon the certifications.

MR. BOIES: No. It's only based on the --

QUESTION: Which he then accepts --

MR. BOIES: No. It's only based on the certifications that are contested. In other words, if you are going to order the manual review of the ballots, the issue is what ballots are contested, and second, is there a judicial review of those ballots.

QUESTION: You have to know how close the state election was, don't you?

MR. BOIES: Yes. But you --

QUESTION: For which purpose you'll accept the certifications.

MR. BOIES: Yes. That's true.

QUESTION: And here --

MR. BOIES: And you had a certification.

QUESTION: And here you are telling him to accept it not de novo, but deferring to Broward County.

MR. BOIES: I think what the Supreme Court is saying is you have got a certification. That certification shows a certain vote total. Now, you take that certification until it is contested, and it can be contested by either or both parties. You do not have, until it is contested, you do not have contested ballots. Once have you contested ballots, then going back to State against Williams, Nuccio against Williams in 1929, cited in our papers, then it becomes a judicial question, and what the court holds is you then look at that as a judicial matter and that is why you have going on in Leon County the review of the Miami-Dade ballots under the court's supervision.

Now, I would point out that we asked to have the Miami-Dade ballots reviewed. We also asked to have the 3,300 Palm Beach ballots reviewed, but the supreme court said no to us on that. They said yes, you can have the 9,000 Miami-Dade ballots reviewed. They also said, which we didn't ask for, they said as a matter of remedy, we want to review the undervotes all around the state.

QUESTION: Mr. Boies, one of the dissenting justices in the Supreme Court of Florida said that meant

177,000 ballots. Was he correct in your view?

MR. BOIES: No. That is a result of adding the so-called undervotes that were mentioned and the so-called overvotes that were mentioned. Either an undervote where no vote registers for president or an overvote where two or more registers for president are discarded, because you can't vote twice, and if you vote not at all, and in either circumstance, your vote doesn't get counted.

QUESTION: So if you disagree that 177,000 ballots will be involved in this recount, how many do you think there are?

MR. BOIES: It's approximately 60,000, I think, Your Honor. It turns out to be less than that because of the recounts that have already been completed, but I think the total sort of blank ballots for the presidency start at around 60,000.

QUESTION: Mr. Boies, can I ask, ask you this question. Does that mean there are 110,000 overvotes?

MR. BOIES: That's right.

QUESTION: And if that's the case, what is your response to the Chief Justice of Florida's concern that the recount relates only to undervotes and not overvotes?

MR. BOIES: Well first, nobody asked for a contest of the overvotes, and the contest statute begins with a party saying that there is either a rejection of

legal votes or an acceptance of illegal votes.

QUESTION: But as a matter of remedy it's ordered a statewide recount in counties where the ballots were not contested, and that's where I'm having some difficulty, and it goes back to, in part to your answer that you gave to Justice Stevens -- Justice Scalia about Broward County, and in part to the answer you are giving to Justice Stevens now. Why is it that you say on the one hand to Justice Scalia, oh, well, these weren't part of the contest, but now all of a sudden we are talking about statewide, not all of which were contested, but we are not talking about the overvotes?

MR. BOIES: Two parts to the answer. The reason that I said what I did to Justice Scalia was that I think that if this Court were to rule that there was something wrong with the statewide recounts, that they were being done by canvassing boards as opposed to directly by the court, or because the court was not supervising the particular expression of voter intent, what the court would have done is simply cut back on a remedy that we didn't ask for.

The second part is that when you are dealing with overvotes, remember, this is a machine issue. When you are dealing with overvotes, the machine has already registered two votes. Now, there may be another vote

there, a dimpled vote or an indented vote that the machine did not register. But once you get two votes, that ballot doesn't get counted for the presidency.

QUESTION: They gave an example. The example they gave in their brief was there is a punch for Governor Bush, and then there is a punch for write-in and the write-in says I want Governor Bush and so I think their implication is that that would have been rejected by the machine, but if you looked at it by hand the intent of the voter would be clear. Now I don't know if there are such votes, but they say there might be.

MR. BOIES: There is nothing in the record that suggests that there are such votes. If anybody had contested the overvotes, it would have been a relatively simple process to test that because you could simply test it as to whether the double vote was a write-in vote or was another candidate.

QUESTION: I gathered from the opinion of the Supreme Court of Florida that the Vice President did not ask for as broad a recount as the Supreme Court granted, but that it thought that to do just what he wanted would be unfair and therefore out of fairness, they granted the wider recount, am I correct in that?

MR. BOIES: I think that's right. I think that's the way I would interpret it, Mr. Chief Justice.

QUESTION: Mr. Boies, I have one other perplexity about the scheme that's been set up here. What -- there is a very, as you point out, there is scant statutory provision concerning, concerning the contest. There is quite detailed statutory provision concerning the protest period. And it tells everybody how to act and time limits and all of that.

Why would anyone bother to go through the protest period, have these ballots counted by the canvassing boards, have them certify the results? Why go through all that when the whole thing begins again with a contest? There is no, no -- once a contest filed, the certification is meaningless. What advantage is there to win the protest?

MR. BOIES: It's not meaningless. It becomes the baseline, and in every contest that has ever taken place, including this one, that has been the baseline that has determined 99-plus percent of the votes, and what is contested are simply those ballots that during the protest phase have been identified as disputed ballots, so that the, the protest phase solves 99 percent of the election or more. What is left over are those ballots that one side or the other has contested, and that's what the contest deals with.

QUESTION: My concern is that the contest period

as we have been talking about requires the setting of standards, judicial review, and by reason of what I take it to be your earlier position in the litigation, this period has been truncated by 19 days, causing the time frame of which we are all so conscious, making it difficult for appellate review, and it seems to me, and we are getting back to the beginning of this, that the legislature could not have done that by a statute without it being under law, and that neither can the Supreme Court without it being a new law, a new scheme, a new system for recounting at this late date. I'm very troubled by that.

MR. BOIES: But, Your Honor, at this -- leaving aside the prior case about the extension of the time for certification, which I think at this stage you have to leave aside because at the contest stage, what you are doing is you are contesting specific ballots whether or not they were included in the certification.

It's absolutely clear under Florida law that that's what the contest is about, so at the contest stage, the only question is can you complete the contest of the contested ballots in the time available?

Everything that's in the record is, that we could have and indeed we still may be able to, if that count can go forward.

QUESTION: Including appeals to the Supreme

Court of Florida, and another petition to this Court?

MR. BOIES: Excuse me, Your Honor?

QUESTION: I said after the circuit judge says that the contest comes out this way, surely there is going to be an appeal to the Supreme Court of Florida and likely another petition to this Court. Surely that couldn't have been done by December 12th, could it?

MR. BOIES: Your Honor, I think, I think the appeal to the Florida Supreme Court could have and indeed the schedule that was set up would have made that quite possible. There is about another day or so, except for, except for four or five counties, all of the counties would be completed in about another day. And maybe even those counties could be now because as I understand it some of them have taken advantage of the time to get the procedures ready to count.

QUESTION: Just a minute, Mr. Boies. Wouldn't the Supreme Court of Florida want briefs and wouldn't the parties have needed time to prepare briefs?

MR. BOIES: Yes, Your Honor, but as we did in this Court, we have done in the Florida Supreme Court a number of times and that is to do the briefs and have the argument the next day and a decision within 24 hours.

QUESTION: After the counts are conducted in the individual counties, wouldn't the Leon County circuit

judge have to review those counts? After all, it's -- I mean, the purpose of the scheme is to have a uniform determination.

MR. BOIES: To the extent that there are contested or disputed ballots --.

QUESTION: Right .

MR. BOIES: -- I think that may be so, Your Honor.

QUESTION: Well, wouldn't that take a fair amount of time and is that delegable? I assume he would have to do that personally.

MR. BOIES: We believe that it could be done in the time available. We also believe that we have available to us the argument that says you finished what we contested. Although the supreme court has said as a matter of remedy it would be a good idea to do these other things that nobody asked for, that if it gets down to the point where you can -- you have done the contest and you simply have not gotten completed all of this other remedy under 168 subsection 8, that we are still entitled under settled Florida law to have our votes counted.

QUESTION: The supreme court said you had to do it all in the interest of fairness.

MR. BOIES: I think that what --.

QUESTION: I thought you agreed with me on that

a moment ago.

MR. BOIES: I did, Your Honor. I think that what they were saying is that as a matter of remedy this is the fairest way to do it. I don't think they were saying that it would violate fundamental fairness to only take into account what you could get done in the time available. There's nothing in the Supreme Court opinion that would suggest this.

QUESTION: Mr. Boies, would you explain to me again how the protest and the contest fits in. You said that the -- let's assume that my complaint that I want to protest is the failure to do undercounts to those ballots that were undercounted, okay? That's my protest.

MR. BOIES: Right.

QUESTION: Why would I ever bring that in a protest proceeding? Why wouldn't I just go right to the contest because it doesn't matter whether I win or lose the protest proceeding. It's de novo at the contest stage. What possible advantage is there to go through the protest proceeding?

MR. BOIES: If you've identified the ballots, you could presumably wait and do it at the contest phase. There's no particular advantage to doing that. The fact --.

QUESTION: I thought the advantage might be as

described in the Florida case, Boardman v. Esteva, saying that the certified election returns which occur after the protest period are presumptively correct, and they must be upheld unless clearly outside legal requirements. I thought that was Florida law.

MR. BOIES: Your Honor --.

QUESTION: Which would make it important to have a protest.

MR. BOIES: I think that's right. I think that is right. I would point out that --.

QUESTION: I think the Florida court has sort of ignored that old Boardman case.

MR. BOIES: Your Honor, I think the Boardman case relates not to the counting of votes, it has nothing to do with the standard in terms of the intent of the voter. The Boardman case, the language that you're referring to is at page 268 of the Southern Reporter report of that case, and what is clear from that page and that discussion is it's dealing with the issue of whether or not because the canvassing board threw away the envelopes from the absentee ballots so they could not be checked, whether that invalidated the absentee ballots, and the court says no, it doesn't, because it's important to count all these votes, and because we assume that what they were doing was proper. That does not, I respectfully

suggest, at all deal with the question of deference to the voter intent determination which the court has repeatedly said is a matter for judicial determination.

The other thing that I would say with respect to intent is I know the Court is concerned about whether the standard is too general or not. Some states have made specific criteria their law. Other states, not just Florida -- 10 or 11 of them, including Massachusetts, in the Dellahunt case that we cited, has stuck with this very general standard.

QUESTION: All right, let's assume --.

MR. BOIES: There's a sense where that may be an Article II issue.

QUESTION: Mr. Boies, let's assume that at end of the day the Leon County, Florida judge, gets a series of counts from different counties, and they heard those counties have used different standards in making their counts. At that point, in your judgment, is it a violation of the Constitution for the Leon County judge to say, I don't care that there are different standards as long as they purported to fall on intent of the voter, that's good enough.

QUESTION: I'll extend your time by two minutes, Mr. Boies.

MR. BOIES: Yes. I do not believe that that

would violate the equal protection of due process clause. That distinction between how they interpret the intent of the voter standard is going to have a lot less effect on how votes are treated than the mere difference in the types of machines that are used.

QUESTION: Then the fact that there is a single judge at the end of the process, in your judgment, really is not an answer to the concern that we have raised.

MR. BOIES: No, I think it is an answer. I think there are two answers to it. First, I think that the answer that they did it differently, different people interpreting the general standard differently, would not raise a problem even in the absence of judicial review of that.

Second, even if that would have raised a constitutional problem, I think the judicial review that provides the standardization would solve that problem.

The third thing that I was saying is that any differences as to how this standard is interpreted have a lot less significance in terms of what votes are counted or not counted than simply the differences in machines that exist throughout the counties of Florida.

There are five times as many undervotes in punch card ballot counties than in optical ballot counties. Now, for whatever that reason is, whether it's voter error

or machine problems, that statistic, you know, makes clear that there is some difference in how votes are being treated county by county. That difference is much greater than the difference in how many votes are recovered in Palm Beach or Broward or Volusia or Miami-Dade, so that the differences of interpretation of the standard, the general standard are resulting in far fewer differences among counties than simply the differences in the machines that they have.

QUESTION: Thank you, Mr. Boies.

MR. BOIES: Thank you very much.

QUESTION: Mr. Olson, you have five minutes remaining.

REBUTTAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONERS.

MR. OLSON: Thank you, Mr. Chief Justice. I would like to start with a point or two with respect to the equal protection due process component of this case. The Florida Democratic Party on November 20 was asking the -- november 20th of this year, was asking the Florida Supreme Court to establish uniform standards with respect to the looking at and evaluating these ballots, a recognition that there were no uniform standards and that there ought to be.

Last Tuesday in the 11th Circuit, unless I

misheard him, the attorney for the Attorney General of Florida said that the standards for evaluating these ballots are evolving. There is no question, based upon this record, that there are different standards from county to county.

QUESTION: And there are different ballots from county to county too, Mr. Olson, and that's part of the argument that I don't understand. There are machines, there's the optical scanning, and then there are a whole variety of ballots. There is the butterfly ballot that we've heard about and other kinds of postcard ballots. How can you have one standard when there are so many varieties of ballots?

MR. OLSON: Certainly the standard should be that similarly situated voters and similarly situated ballots ought to be evaluated by comparable standards.

QUESTION: Then you would have to have several standards, county by county would it be?

MR. OLSON: You're certainly going to have to look at a ballot that you mark in one way different than these punch card ballots. Our point is, with respect to the punch card ballots, is that there are different standards for evaluating those ballots from county to county and it is a documented history in this case that there have been different standards between November 7th

and the present with respect to how those punch card ballots are evaluated.

Palm Springs is the best example. They started with a clear rule which had been articulated and explained to the voters, by the way, as of 1990. Then they got into the process of evaluating these ballots and changed the standard from moment to moment during the first day and again, they evolved from the standard that the chad had to be punched through to the so-called dimpled ballot standard, indentations on the ballot. There was a reason why that was done. It was because they weren't producing enough additional votes so that there's pressure on to change the standards. And that will happen in a situation which is where the process is ultimately subjective, completely up to the discretion of the official, and there's no requirement of any uniformity.

Now, we now have something that's worse than that. We have standards that are different throughout 64 different counties. We've got only undercounts being considered where an indentation on a ballot will now be counted as a vote, but other ballots that may have indentations aren't going to be counted at all. The overvotes are in a different category, and in this very remedy the ballots in Miami-Dade are being treated differently. Some of them have been all examined and the

balance of the process, the remaining 80 percent will be looked at only in connection with the undercounts.

QUESTION: Mr. Olson, do I understand that your argument on the equal protection branch would render academic what was your main argument that's troublesome, that is that we must say that the Florida Supreme Court was so misguided in its application of its own law that we reject that, and we, the Supreme Court of the United States, decide what the Florida law is?

MR. OLSON: I'm not sure I know the answer to that question, whether that would render academic the challenge. There is a clear constitutional violation, in our opinion, with respect to Article II because virtually every aspect of Florida's election code has been changed as a result of these two decisions.

QUESTION: But the Florida Supreme Court told us that it hasn't been changed and just looking at one of the cases that you cite frequently, the O'Brien against Skinner case, this court said, well, maybe we would have decided the New York law differently but the highest court of the state has concluded otherwise. It is not our function to construe a state statute contrary to the construction given it by the highest court of the state.

MR. OLSON: The only thing I can say in response to that is that what this Court said one week ago today,

that as a general rule the court defers to a state court's interpretation of a state statute, but not where the legislature is acting under authority granted to it by the Constitution of the United States.

The final point I would like to make is with respect to section 5. It is quite clear that the court in both the earlier decision and the decision last Friday was aware and concerned about compliance with section 5. It construed section 5 in a way that allowed it by labeling what it was doing as interpretation to change in dramatic respects the Florida election law, and we submit because it did, so misconstrued the applicability not only with respect to finality but the other part of section 5 requires a determination of controversies pursuant to a set of laws that are in place at the time of the elections.

QUESTION: If you start with the premise, a clear intent of a vote should count, where there's a clear intent on the ballot, it should count as a vote, can't you reasonably get the majority's conclusion?

MR. OLSON: I don't believe so because we know different standards were being applied to get to that point, and they were having different results.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Olson. The case is submitted.

(Whereupon, at 12:27 a.m., the case in the above-entitled matter was submitted.)

December 12, 2000
United States Decision in Bush v. Gore

Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 00–949

GEORGE W. BUSH, ET AL., PETITIONERS *v.*
ALBERT GORE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

[December 12, 2000]

PER CURIAM.

I

On December 8, 2000, the Supreme Court of Florida ordered that the Circuit Court of Leon County tabulate by hand 9,000 ballots in Miami-Dade County. It also ordered the inclusion in the certified vote totals of 215 votes identified in Palm Beach County and 168 votes identified in Miami-Dade County for Vice President Albert Gore, Jr., and Senator Joseph Lieberman, Democratic Candidates for President and Vice President. The Supreme Court noted that petitioner, Governor George W. Bush asserted that the net gain for Vice President Gore in Palm Beach County was 176 votes, and directed the Circuit Court to resolve that dispute on remand. ___ So. 2d, at ___ (slip op., at 4, n. 6). The court further held that relief would require manual recounts in all Florida counties where so-called "undervotes" had not been subject to manual tabulation. The court ordered all manual recounts to begin at once. Governor Bush and Richard Cheney, Republican Candidates for the Presidency and Vice Presidency, filed an emergency application for a stay of this mandate. On December 9, we granted the application, treated the appli-

cation as a petition for a writ of certiorari, and granted certiorari. *Post,* p. ___.

The proceedings leading to the present controversy are discussed in some detail in our opinion in *Bush* v. *Palm Beach County Canvassing Bd., ante,* p. ____ *(per curiam) (Bush I).* On November 8, 2000, the day following the Presidential election, the Florida Division of Elections reported that petitioner, Governor Bush, had received 2,909,135 votes, and respondent, Vice President Gore, had received 2,907,351 votes, a margin of 1,784 for Governor Bush. Because Governor Bush's margin of victory was less than "one-half of a percent . . . of the votes cast," an automatic machine recount was conducted under §102.141(4) of the election code, the results of which showed Governor Bush still winning the race but by a diminished margin. Vice President Gore then sought manual recounts in Volusia, Palm Beach, Broward, and Miami-Dade Counties, pursuant to Florida's election protest provisions. Fla. Stat. §102.166 (2000). A dispute arose concerning the deadline for local county canvassing boards to submit their returns to the Secretary of State (Secretary). The Secretary declined to waive the November 14 deadline imposed by statute. §§102.111, 102.112. The Florida Supreme Court, however, set the deadline at November 26. We granted certiorari and vacated the Florida Supreme Court's decision, finding considerable uncertainty as to the grounds on which it was based. *Bush I, ante,* at ___–___ (slip. op., at 6–7). On December 11, the Florida Supreme Court issued a decision on remand reinstating that date. ___ So. 2d ___, ___ (slip op. at 30–31).

On November 26, the Florida Elections Canvassing Commission certified the results of the election and declared Governor Bush the winner of Florida's 25 electoral votes. On November 27, Vice President Gore, pursuant to Florida's contest provisions, filed a complaint in Leon

County Circuit Court contesting the certification. Fla. Stat. §102.168 (2000). He sought relief pursuant to §102.168(3)(c), which provides that "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election" shall be grounds for a contest. The Circuit Court denied relief, stating that Vice President Gore failed to meet his burden of proof. He appealed to the First District Court of Appeal, which certified the matter to the Florida Supreme Court.

Accepting jurisdiction, the Florida Supreme Court affirmed in part and reversed in part. *Gore* v. *Harris,* ___ So. 2d. ____ (2000). The court held that the Circuit Court had been correct to reject Vice President Gore's challenge to the results certified in Nassau County and his challenge to the Palm Beach County Canvassing Board's determination that 3,300 ballots cast in that county were not, in the statutory phrase, "legal votes."

The Supreme Court held that Vice President Gore had satisfied his burden of proof under §102.168(3)(c) with respect to his challenge to Miami-Dade County's failure to tabulate, by manual count, 9,000 ballots on which the machines had failed to detect a vote for President ("undervotes"). ___ So. 2d., at ___ (slip. op., at 22–23). Noting the closeness of the election, the Court explained that "[o]n this record, there can be no question that there are legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt." *Id.*, at ___ (slip. op., at 35). A "legal vote," as determined by the Supreme Court, is "one in which there is a 'clear indication of the intent of the voter.'" *Id.*, at ____ (slip op., at 25). The court therefore ordered a hand recount of the 9,000 ballots in Miami-Dade County. Observing that the contest provisions vest broad discretion in the circuit judge to "provide any relief appropriate under such circumstances," Fla. Stat. §102.168(8) (2000), the Supreme Court further held

that the Circuit Court could order "the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties that have not conducted a manual recount or tabulation of the undervotes . . . to do so forthwith, said tabulation to take place in the individual counties where the ballots are located." ____ So. 2d, at ____ (slip. op., at 38).

The Supreme Court also determined that both Palm Beach County and Miami-Dade County, in their earlier manual recounts, had identified a net gain of 215 and 168 legal votes for Vice President Gore. *Id.*, at ___ (slip. op., at 33–34). Rejecting the Circuit Court's conclusion that Palm Beach County lacked the authority to include the 215 net votes submitted past the November 26 deadline, the Supreme Court explained that the deadline was not intended to exclude votes identified after that date through ongoing manual recounts. As to Miami-Dade County, the Court concluded that although the 168 votes identified were the result of a partial recount, they were "legal votes [that] could change the outcome of the election." *Id.*, at (slip op., at 34). The Supreme Court therefore directed the Circuit Court to include those totals in the certified results, subject to resolution of the actual vote total from the Miami-Dade partial recount.

The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, §1, cl. 2, of the United States Constitution and failing to comply with 3 U. S. C. §5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause.

II

A

The closeness of this election, and the multitude of legal

challenges which have followed in its wake, have brought into sharp focus a common, if heretofore unnoticed, phenomenon. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot. See Ho, More Than 2M Ballots Uncounted, AP Online (Nov. 28, 2000); Kelley, Balloting Problems Not Rare But Only In A Very Close Election Do Mistakes And Mismarking Make A Difference, Omaha World-Herald (Nov. 15, 2000). In certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements.

This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.

B

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U. S. Const., Art. II, §1. This is the source for the statement in *McPherson* v. *Blacker*, 146 U. S. 1, 35 (1892), that the State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. *Id.*, at 28–33. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people,

the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *id.*, at 35 ("[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated") (quoting S. Rep. No. 395, 43d Cong., 1st Sess.).

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. See, *e.g.*, *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964).

There is no difference between the two sides of the present controversy on these basic propositions. Respondents say that the very purpose of vindicating the right to vote justifies the recount procedures now at issue. The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to count

them. In some cases a piece of the card— a chad— is hanging, say by two corners. In other cases there is no separation at all, just an indentation.

The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of the voter." *Gore* v. *Harris*, ___ So. 2d, at ___ (slip op., at 39). This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.

The want of those rules here has led to unequal evaluation of ballots in various respects. See *Gore* v. *Harris,* ___ So. 2d, at ___ (slip op., at 51) (Wells, J., dissenting)

("Should a county canvassing board count or not count a 'dimpled chad' where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree"). As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.

The record provides some examples. A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. 3 Tr. 497, 499 (Dec. 3, 2000). And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.

An early case in our one person, one vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties. *Gray* v. *Sanders*, 372 U. S. 368 (1963). The Court found a constitutional violation. We relied on these principles in the context of the Presidential selection process in *Moore* v. *Ogilvie,* 394 U. S. 814 (1969), where we invalidated a county-based procedure that diluted the influence of citizens in larger counties in the nominating process. There we observed that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.,* at 819.

The State Supreme Court ratified this uneven treatment. It mandated that the recount totals from two counties, Miami-Dade and Palm Beach, be included in the certified total. The court also appeared to hold *sub silentio* that the recount totals from Broward County, which were not completed until after the original November 14 certification by the Secretary of State, were to be considered part of the new certified vote totals even though the county certification was not contested by Vice President Gore. Yet each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.

In addition, the recounts in these three counties were not limited to so-called undervotes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, the so-called overvotes. Neither category will be counted by the machine. This is not a trivial concern. At oral argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant

standards exemplifies concerns with the remedial processes that were under way.

That brings the analysis to yet a further equal protection problem. The votes certified by the court included a partial total from one county, Miami-Dade. The Florida Supreme Court's decision thus gives no assurance that the recounts included in a final certification must be complete. Indeed, it is respondent's submission that it would be consistent with the rules of the recount procedures to include whatever partial counts are done by the time of final certification, and we interpret the Florida Supreme Court's decision to permit this. See ____ So. 2d, at ____, n. 21 (slip op., at 37, n. 21) (noting "practical difficulties" may control outcome of election, but certifying partial Miami-Dade total nonetheless). This accommodation no doubt results from the truncated contest period established by the Florida Supreme Court in *Bush I*, at respondents' own urging. The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.

In addition to these difficulties the actual process by which the votes were to be counted under the Florida Supreme Court's decision raises further concerns. That order did not specify who would recount the ballots. The county canvassing boards were forced to pull together ad hoc teams comprised of judges from various Circuits who had no previous training in handling and interpreting ballots. Furthermore, while others were permitted to observe, they were prohibited from objecting during the recount.

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protec-

tion in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

Given the Court's assessment that the recount process underway was probably being conducted in an unconstitutional manner, the Court stayed the order directing the recount so it could hear this case and render an expedited decision. The contest provision, as it was mandated by the State Supreme Court, is not well calculated to sustain the confidence that all citizens must have in the outcome of elections. The State has not shown that its procedures include the necessary safeguards. The problem, for instance, of the estimated 110,000 overvotes has not been addressed, although Chief Justice Wells called attention to the concern in his dissenting opinion. See ____ So. 2d, at ____, n. 26 (slip op., at 45, n. 26).

Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary of State has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for

which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary of State, as required by Fla. Stat. §101.015 (2000).

The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U. S. C. §5. ___ So. 2d, at ___ (slip op. at 27); see also *Palm Beach Canvassing Bd.* v. *Harris*, 2000 WL 1725434, *13 (Fla. 2000). That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. See post, at 6 (SOUTER, J., dissenting); *post*, at 2, 15 (BREYER, J., dissenting). The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U. S. C. §5, JUSTICE BREYER's proposed remedy– remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18-contemplates action in violation of the Florida election code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. §102.168(8) (2000).

* * *

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

The judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Pursuant to this Court's Rule 45.2, the Clerk is directed to issue the mandate in this case forthwith.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 00–949

GEORGE W. BUSH, ET AL., PETITIONERS *v.*
ALBERT GORE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

[December 12, 2000]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring.

We join the *per curiam* opinion. We write separately because we believe there are additional grounds that require us to reverse the Florida Supreme Court's decision.

I

We deal here not with an ordinary election, but with an election for the President of the United States. In *Burroughs* v. *United States,* 290 U. S. 534, 545 (1934), we said:

> "While presidential electors are not officers or agents of the federal government (*In re Green*, 134 U. S. 377, 379), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."

Likewise, in *Anderson* v. *Celebrezze,* 460 U. S. 780, 794–795 (1983) (footnote omitted), we said: "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President

and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. Cf. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938). Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. See U. S. Const., Art. IV, §4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, §1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.

In *McPherson* v. *Blacker,* 146 U. S. 1 (1892), we explained that Art. II, §1, cl. 2, "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. *Id.*, at 27. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.

3 U. S. C. §5 informs our application of Art. II, §1, cl. 2, to the Florida statutory scheme, which, as the Florida Supreme Court acknowledged, took that statute into account. Section 5 provides that the State's selection of electors "shall be conclusive, and shall govern in the counting of the electoral votes" if the electors are chosen under laws enacted prior to election day, and if the selec-

tion process is completed six days prior to the meeting of the electoral college. As we noted in *Bush* v. *Palm Beach County Canvassing Bd., ante,* at 6.

> "Since §5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law."

If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the "safe harbor" provided by §5.

In Florida, the legislature has chosen to hold statewide elections to appoint the State's 25 electors. Importantly, the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State (Secretary), Fla. Stat. §97.012(1) (2000), and to state circuit courts, §§102.168(1), 102.168(8). Isolated sections of the code may well admit of more than one interpretation, but the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies. In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida's executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court's actions. But, with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.

In order to determine whether a state court has in-

fringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court. Though we generally defer to state courts on the interpretation of state law— see, *e.g.*, *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975)— there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.

For example, in *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958), it was argued that we were without jurisdiction because the petitioner had not pursued the correct appellate remedy in Alabama's state courts. Petitioners had sought a state-law writ of certiorari in the Alabama Supreme Court when a writ of mandamus, according to that court, was proper. We found this state-law ground inadequate to defeat our jurisdiction because we were "unable to reconcile the procedural holding of the Alabama Supreme Court" with prior Alabama precedent. *Id.*, at 456. The purported state-law ground was so novel, in our independent estimation, that "petitioner could not fairly be deemed to have been apprised of its existence." *Id.*, at 457.

Six years later we decided *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), in which the state court had held, contrary to precedent, that the state trespass law applied to black sit-in demonstrators who had consent to enter private property but were then asked to leave. Relying upon *NAACP*, we concluded that the South Carolina Supreme Court's interpretation of a state penal statute had impermissibly broadened the scope of that statute beyond what a fair reading provided, in violation of due process. See 378 U. S., at 361–362. What we would do in the present case is precisely parallel: Hold that the Florida Supreme Court's interpretation of the Florida election laws

impermissibly distorted them beyond what a fair reading required, in violation of Article II.[1]

This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

II

Acting pursuant to its constitutional grant of authority, the Florida Legislature has created a detailed, if not perfectly crafted, statutory scheme that provides for appointment of Presidential electors by direct election. Fla. Stat. §103.011 (2000). Under the statute, "[v]otes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates." *Ibid.* The legislature has designated the Secretary of State as the "chief election officer," with the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the

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[1] Similarly, our jurisprudence requires us to analyze the "background principles" of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights. See *Lucas* v. *South Carolina Coastal Council,* 505 U. S. 1003 (1992). In one of our oldest cases, we similarly made an independent evaluation of state law in order to protect federal treaty guarantees. In *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch 603 (1813), we disagreed with the Supreme Court of Appeals of Virginia that a 1782 state law had extinguished the property interests of one Denny Fairfax, so that a 1789 ejectment order against Fairfax supported by a 1785 state law did not constitute a future confiscation under the 1783 peace treaty with Great Britain. See *id.,* at 623; *Hunter* v. *Fairfax's Devisee*, 1 Munf. 218 (Va. 1809).

election laws." §97.012. The state legislature has delegated to county canvassing boards the duties of administering elections. §102.141. Those boards are responsible for providing results to the state Elections Canvassing Commission, comprising the Governor, the Secretary of State, and the Director of the Division of Elections. §102.111. Cf. *Boardman* v. *Esteva,* 323 So. 2d 259, 268, n. 5 (1975) ("The election process . . . is committed to the executive branch of government through duly designated officials all charged with specific duties [The] judgments [of these officials] are entitled to be regarded by the courts as presumptively correct . . . ").

After the election has taken place, the canvassing boards receive returns from precincts, count the votes, and in the event that a candidate was defeated by .5% or less, conduct a mandatory recount. Fla. Stat. §102.141(4) (2000). The county canvassing boards must file certified election returns with the Department of State by 5 p.m. on the seventh day following the election. §102.112(1). The Elections Canvassing Commission must then certify the results of the election. §102.111(1).

The state legislature has also provided mechanisms both for protesting election returns and for contesting certified election results. Section 102.166 governs protests. Any protest must be filed prior to the certification of election results by the county canvassing board. §102.166(4)(b). Once a protest has been filed, "the county canvassing board may authorize a manual recount." §102.166(4)(c). If a sample recount conducted pursuant to §102.166(5) "indicates an error in the vote tabulation which could affect the outcome of the election," the county canvassing board is instructed to: "(a) Correct the error and recount the remaining precincts with the vote tabulation system; (b) Request the Department of State to verify the tabulation software; or (c) Manually recount all ballots," §102.166(5). In the event a canvassing board

chooses to conduct a manual recount of all ballots, §102.166(7) prescribes procedures for such a recount.

Contests to the certification of an election, on the other hand, are controlled by §102.168. The grounds for contesting an election include "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." §102.168(3)(c). Any contest must be filed in the appropriate Florida circuit court, Fla. Stat. §102.168(1), and the canvassing board or election board is the proper party defendant, §102.168(4). Section 102.168(8) provides that "[t]he circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." In Presidential elections, the contest period necessarily terminates on the date set by 3 U. S. C. §5 for concluding the State's "final determination" of election controversies."

In its first decision, *Palm Beach Canvassing Bd.* v. *Harris*, ___ So. 2d, ___ (Nov. 21, 2000) (*Harris I*), the Florida Supreme Court extended the 7-day statutory certification deadline established by the legislature.[2] This modification of the code, by lengthening the protest period, necessarily shortened the contest period for Presidential elections. Underlying the extension of the certification deadline and the shortchanging of the contest period was, presumably, the clear implication that certification was a matter of significance: The certified winner would enjoy presumptive validity, making a contest proceeding by the

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[2] We vacated that decision and remanded that case; the Florida Supreme Court reissued the same judgment with a new opinion on December 11, 2000, ___ So. 2d, ___.

losing candidate an uphill battle. In its latest opinion, however, the court empties certification of virtually all legal consequence during the contest, and in doing so departs from the provisions enacted by the Florida Legislature.

The court determined that canvassing boards' decisions regarding whether to recount ballots past the certification deadline (even the certification deadline established by *Harris I*) are to be reviewed *de novo*, although the election code clearly vests discretion whether to recount in the boards, and sets strict deadlines subject to the Secretary's rejection of late tallies and monetary fines for tardiness. See Fla. Stat. §102.112 (2000). Moreover, the Florida court held that all late vote tallies arriving during the contest period should be automatically included in the certification regardless of the certification deadline (even the certification deadline established by *Harris I*), thus virtually eliminating both the deadline and the Secretary's discretion to disregard recounts that violate it.[3]

Moreover, the court's interpretation of "legal vote," and hence its decision to order a contest-period recount, plainly departed from the legislative scheme. Florida statutory law cannot reasonably be thought to *require* the counting of improperly marked ballots. Each Florida precinct before election day provides instructions on how properly to cast a vote, §101.46; each polling place on election day contains a working model of the voting machine it uses, §101.5611; and each voting booth contains a sample ballot, §101.46. In precincts using punch-card ballots, voters are instructed to punch out the ballot cleanly:

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[3] Specifically, the Florida Supreme Court ordered the Circuit Court to include in the certified vote totals those votes identified for Vice President Gore in Palm Beach County and Miami-Dade County.

> AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.

Instructions to Voters, quoted in *Touchston* v. *McDermott*, 2000 WL 1781942, *6 & n. 19 (CA11) (Tjoflat, J., dissenting). No reasonable person would call it "an error in the vote tabulation," FLA. STAT. §102.166(5), or a "rejection of legal votes," FLA. STAT. §102.168(3)(c),[4] when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify. The scheme that the Florida Supreme Court's opinion attributes to the legislature is one in which machines are *required* to be "capable of correctly counting votes," §101.5606(4), but which nonetheless regularly produces elections in which legal votes are predictably *not* tabulated, so that in close elections manual recounts are regularly required. This is of course absurd. The Secretary of State, who is authorized by law to issue binding interpretations of the election code, §§97.012, 106.23, rejected this peculiar reading of the statutes. See DE 00–13 (opinion of the Division of Elections). The Florida Supreme Court, although it must defer to the Secretary's interpretations, see *Krivanek* v. *Take Back Tampa Political Committee*, 625 So. 2d 840, 844 (Fla. 1993), rejected her reasonable interpretation and embraced the peculiar one. See *Palm Beach County Canvassing Board* v. *Harris*, No. SC00–2346 (Dec. 11, 2000) (*Har-*

[4] It is inconceivable that what constitutes a vote that must be counted under the "error in the vote tabulation" language of the protest phase is different from what constitutes a vote that must be counted under the "legal votes" language of the contest phase.

ris III).

But as we indicated in our remand of the earlier case, in a Presidential election the clearly expressed intent of the legislature must prevail. And there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots, as an examination of the Florida Supreme Court's textual analysis shows. We will not parse that analysis here, except to note that the principal provision of the election code on which it relied, §101.5614(5), was, as the Chief Justice pointed out in his dissent from *Harris II*, entirely irrelevant. See *Gore* v. *Harris*, No. SC00-2431, slip op., at 50 (Dec. 8, 2000). The State's Attorney General (who was supporting the Gore challenge) confirmed in oral argument here that never before the present election had a manual recount been conducted on the basis of the contention that "undervotes" should have been examined to determine voter intent. Tr. of Oral Arg. in *Bush* v. *Palm Beach County Canvassing Bd.*, 39–40 (Dec. 1, 2000); cf. *Broward County Canvassing Board* v. *Hogan*, 607 So. 2d 508, 509 (Fla. Ct. App. 1992) (denial of recount for failure to count ballots with "hanging paper chads"). For the court to step away from this established practice, prescribed by the Secretary of State, the state official charged by the legislature with "responsibility to . . . [o]btain and maintain uniformity in the application, operation, and interpretation of the election laws," §97.012(1), was to depart from the legislative scheme.

III

The scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the "legislative wish" to take advantage of the safe harbor provided by 3 U. S. C. §5. *Bush* v. *Palm Beach County Canvassing Bd., ante,* at 6. December 12, 2000, is the last date for a final determination of the Florida electors that will satisfy §5. Yet in the late afternoon of December 8th— four days before this

deadline— the Supreme Court of Florida ordered recounts of tens of thousands of so-called "undervotes" spread through 64 of the State's 67 counties. This was done in a search for elusive— perhaps delusive— certainty as to the exact count of 6 million votes. But no one claims that these ballots have not previously been tabulated; they were initially read by voting machines at the time of the election, and thereafter reread by virtue of Florida's automatic recount provision. No one claims there was any fraud in the election. The Supreme Court of Florida ordered this additional recount under the provision of the election code giving the circuit judge the authority to provide relief that is "appropriate under such circumstances." Fla. Stat. §102.168(8) (2000).

Surely when the Florida Legislature empowered the courts of the State to grant "appropriate" relief, it must have meant relief that would have become final by the cut-off date of 3 U. S. C. §5. In light of the inevitable legal challenges and ensuing appeals to the Supreme Court of Florida and petitions for certiorari to this Court, the entire recounting process could not possibly be completed by that date. Whereas the majority in the Supreme Court of Florida stated its confidence that "the remaining undervotes in these counties can be [counted] within the required time frame," ___ So. 2d. at ___, n. 22 (slip op., at 38, n. 22), it made no assertion that the seemingly inevitable appeals could be disposed of in that time. Although the Florida Supreme Court has on occasion taken over a year to resolve disputes over local elections, see, *e.g.*, *Beckstrom* v. *Volusia County Canvassing Bd.*, 707 So. 2d 720 (1998) (resolving contest of sheriff's race 16 months after the election), it has heard and decided the appeals in the present case with great promptness. But the federal deadlines for the Presidential election simply do not permit even such a shortened process.

As the dissent noted:

> "In [the four days remaining], all questionable ballots must be reviewed by the judicial officer appointed to discern the intent of the voter in a process open to the public. Fairness dictates that a provision be made for either party to object to how a particular ballot is counted. Additionally, this short time period must allow for judicial review. I respectfully submit this cannot be completed without taking Florida's presidential electors outside the safe harbor provision, creating the very real possibility of disenfranchising those nearly 6 million voters who are able to correctly cast their ballots on election day." ___ So. 2d, at ___ (slip op., at 55) (Wells, C. J., dissenting).

The other dissenters echoed this concern: "[T]he majority is departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos." *Id.,* at ___ (slip op., at 67 (Harding, J., dissenting, Shaw, J. concurring).

Given all these factors, and in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U. S. C. §5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date.

For these reasons, in addition to those given in the *per curiam*, we would reverse.

SUPREME COURT OF THE UNITED STATES

No. 00–949

GEORGE W. BUSH, ET AL., PETITIONERS *v.*
ALBERT GORE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

[December 12, 2000]

JUSTICE STEVENS, with whom JUSTICE GINSBURG AND JUSTICE BREYER join, dissenting.

The Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors. See Art. II, §1, cl. 2. When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion.

The federal questions that ultimately emerged in this case are not substantial. Article II provides that "[e]ach *State* shall appoint, in such Manner as the Legislature *thereof* may direct, a Number of Electors." *Ibid.* (emphasis added). It does not create state legislatures out of whole cloth, but rather takes them as they come— as creatures born of, and constrained by, their state constitutions. Lest there be any doubt, we stated over 100 years ago in *McPherson* v. *Blacker*, 146 U. S. 1, 25 (1892), that "[w]hat is forbidden or required to be done by a State" in the Article II context "is forbidden or required of the legislative power under state constitutions as they exist." In the same vein, we also observed that "[t]he [State's] legislative power is the supreme authority except as limited by the

constitution of the State." *Ibid.*; cf. *Smiley* v. *Holm*, 285 U. S. 355, 367 (1932).[1] The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the state constitution that created it. Moreover, the Florida Legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes. The Florida Supreme Court's exercise of appellate jurisdiction therefore was wholly consistent with, and indeed contemplated by, the grant of authority in Article II.

It hardly needs stating that Congress, pursuant to 3 U. S. C. §5, did not impose any affirmative duties upon the States that their governmental branches could "violate." Rather, §5 provides a safe harbor for States to select electors in contested elections "by judicial or other methods" established by laws prior to the election day. Section 5, like Article II, assumes the involvement of the state judiciary in interpreting state election laws and resolving election disputes under those laws. Neither §5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law.

[1] "Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view." 285 U. S., at 367. It is perfectly clear that the meaning of the words "Manner" and "Legislature" as used in Article II, §1, parallels the usage in Article I, §4, rather than the language in Article V. *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 805 (1995). Article I, §4, and Article II, §1, both call upon legislatures to act in a lawmaking capacity whereas Article V simply calls on the legislative body to deliberate upon a binary decision. As a result, petitioners' reliance on *Leser* v. *Garnett,* 258 U. S. 130 (1922), and *Hawke* v. *Smith (No. 1),* 253 U. S. 221 (1920), is misplaced.

Nor are petitioners correct in asserting that the failure of the Florida Supreme Court to specify in detail the precise manner in which the "intent of the voter," Fla. Stat. §101.5614(5) (Supp. 2001), is to be determined rises to the level of a constitutional violation.[2] We found such a viola-

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[2] The Florida statutory standard is consistent with the practice of the majority of States, which apply either an "intent of the voter" standard or an "impossible to determine the elector's choice" standard in ballot recounts. The following States use an "intent of the voter" standard: Ariz. Rev. Stat. Ann. §16–645(A) (Supp. 2000) (standard for canvassing write-in votes); Conn. Gen. Stat. §9–150a(j) (1999) (standard for absentee ballots, including three conclusive presumptions); Ind. Code §3–12–1–1 (1992); Me. Rev. Stat. Ann., Tit. 21–A, §1(13) (1993); Md. Ann. Code, Art. 33, §11–302(d) (2000 Supp.) (standard for absentee ballots); Mass. Gen. Laws §70E (1991) (applying standard to Presidential primaries); Mich. Comp. Laws §168.799a(3) (Supp. 2000); Mo. Rev. Stat. §115.453(3) (Cum. Supp. 1998) (looking to voter's intent where there is substantial compliance with statutory requirements); Tex. Elec. Code Ann. §65.009(c) (1986); Utah Code Ann. §20A–4–104(5)(b) (Supp. 2000) (standard for write-in votes), §20A–4–105(6)(a) (standard for mechanical ballots); Vt. Stat. Ann., Tit. 17, §2587(a) (1982); Va. Code Ann. §24.2–644(A) (2000); Wash. Rev. Code §29.62.180(1) (Supp. 2001) (standard for write-in votes); Wyo. Stat. Ann. §22–14–104 (1999). The following States employ a standard in which a vote is counted unless it is "impossible to determine the elector's [or voter's] choice": Ala. Code §11–46–44(c) (1992), Ala. Code §17–13–2 (1995); Ariz. Rev. Stat. Ann. §16–610 (1996) (standard for rejecting ballot); Cal. Elec. Code Ann. §15154(c) (West Supp. 2000); Colo. Rev. Stat. §1–7–309(1) (1999) (standard for paper ballots), §1–7–508(2) (standard for electronic ballots); Del. Code Ann., Tit. 15, §4972(4) (1999); Idaho Code §34–1203 (1981); Ill. Comp. Stat., ch. 10, §5/7–51 (1993) (standard for primaries), *id.,* ch. 10, §5/17–16 (1993) (standard for general elections); Iowa Code §49.98 (1999); Me. Rev. Stat. Ann., Tit. 21–A §§696(2)(B), (4) (Supp. 2000); Minn. Stat. §204C.22(1) (1992); Mont. Code Ann. §13–15–202 (1997) (not counting votes if "elector's choice cannot be determined"); Nev. Rev. Stat. §293.367(d) (1995); N. Y. Elec. Law §9–112(6) (McKinney 1998); N. C. Gen. Stat. §§163–169(b), 163–170 (1999); N. D. Cent. Code §16.1–15–01(1) (Supp. 1999); Ohio Rev. Code Ann. §3505.28 (1994); 26 Okla. Stat., Tit. 26, §7–127(6) (1997); Ore. Rev. Stat. §254.505(1) (1991); S. C. Code Ann. §7–13–1120 (1977); S. D. Codified

tion when individual votes within the same State were weighted unequally, see, *e.g., Reynolds* v. *Sims*, 377 U. S. 533, 568 (1964), but we have never before called into question the substantive standard by which a State determines that a vote has been legally cast. And there is no reason to think that the guidance provided to the fact-finders, specifically the various canvassing boards, by the "intent of the voter" standard is any less sufficient— or will lead to results any less uniform— than, for example, the "beyond a reasonable doubt" standard employed everyday by ordinary citizens in courtrooms across this country.[3]

Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated— if not eliminated— by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. Of course, as a general matter, "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex.* v. *Pinson*, 282 U. S. 499, 501 (1931) (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ— despite enormous differences in accuracy[4]— might run afoul of equal protection. So, too, might

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Laws §12–20–7 (1995); Tenn. Code Ann. §2–7–133(b) (1994); W. Va. Code §3–6–5(g) (1999).

[3] Cf. *Victor* v. *Nebraska*, 511 U. S. 1, 5 (1994) ("The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so").

[4] The percentage of nonvotes in this election in counties using a punch-card system was 3.92%; in contrast, the rate of error under the more modern optical-scan systems was only 1.43%. *Siegel* v. *LePore*, No. 00–15981, 2000 WL 1781946, *31, *32, *43 (charts C and F) (CA11,

the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

Even assuming that aspects of the remedial scheme might ultimately be found to violate the Equal Protection Clause, I could not subscribe to the majority's disposition of the case. As the majority explicitly holds, once a state legislature determines to select electors through a popular vote, the right to have one's vote counted is of constitutional stature. As the majority further acknowledges, Florida law holds that all ballots that reveal the intent of the voter constitute valid votes. Recognizing these principles, the majority nonetheless orders the termination of the contest proceeding before all such votes have been tabulated. Under their own reasoning, the appropriate course of action would be to remand to allow more specific procedures for implementing the legislature's uniform general standard to be established.

In the interest of finality, however, the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent— and are therefore legal votes under state law— but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. *Ante*, at 11. But, as I have already noted, those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. *Supra*, at 2. They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to

Dec. 6, 2000). Put in other terms, for every 10,000 votes cast, punch-card systems result in 250 more nonvotes than optical-scan systems. A total of 3,718,305 votes were cast under punch-card systems, and 2,353,811 votes were cast under optical-scan systems. *Ibid.*

count the one appointed on January 4, 1961, well after the Title 3 deadlines. See Josephson & Ross, Repairing the Electoral College, 22 J. Legis. 145, 166, n. 154 (1996).[5] Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." *Ante,* at 10.

Finally, neither in this case, nor in its earlier opinion in *Palm Beach County Canvassing Bd.* v. *Harris,* 2000 WL 1725434 (Fla., Nov. 21, 2000), did the Florida Supreme Court make any substantive change in Florida electoral law.[6] Its decisions were rooted in long-established precedent and were consistent with the relevant statutory provisions, taken as a whole. It did what courts do[7]— it decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted. In so doing, it

[5] Republican electors were certified by the Acting Governor on November 28, 1960. A recount was ordered to begin on December 13, 1960. Both Democratic and Republican electors met on the appointed day to cast their votes. On January 4, 1961, the newly elected Governor certified the Democratic electors. The certification was received by Congress on January 6, the day the electoral votes were counted. Josephson & Ross, 22 J. Legis., at 166, n. 154.

[6] When, for example, it resolved the previously unanswered question whether the word "shall" in Fla. Stat. §102.111 or the word "may" in §102.112 governs the scope of the Secretary of State's authority to ignore untimely election returns, it did not "change the law." Like any other judicial interpretation of a statute, its opinion was an authoritative interpretation of what the statute's relevant provisions have meant since they were enacted. *Rivers* v. *Roadway Express, Inc.,* 511 U. S. 298, 312–313 (1994).

[7] "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison.*, 1 Cranch 137, 177 (1803).

relied on the sufficiency of the general "intent of the voter" standard articulated by the state legislature, coupled with a procedure for ultimate review by an impartial judge, to resolve the concern about disparate evaluations of contested ballots. If we assume– as I do– that the members of that court and the judges who would have carried out its mandate are impartial, its decision does not even raise a colorable federal question.

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 00–949

GEORGE W. BUSH, ET AL., PETITIONERS *v.*
ALBERT GORE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

[December 12, 2000]

JUSTICE SOUTER, with whom JUSTICE BREYER joins and with whom JUSTICE STEVENS and JUSTICE GINSBURG join with regard to all but Part C, dissenting.

The Court should not have reviewed either *Bush* v. *Palm Beach County Canvassing Bd., ante,* p. ___ (*per curiam*), or this case, and should not have stopped Florida's attempt to recount all undervote ballots, see *ante* at ___, by issuing a stay of the Florida Supreme Court's orders during the period of this review, see *Bush* v. *Gore, post* at ____ (slip op., at 1). If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in 3 U.S. C. §15. The case being before us, however, its resolution by the majority is another erroneous decision.

As will be clear, I am in substantial agreement with the dissenting opinions of JUSTICE STEVENS, JUSTICE GINSBURG and JUSTICE BREYER. I write separately only to say how straightforward the issues before us really are.

There are three issues: whether the State Supreme Court's interpretation of the statute providing for a contest of the state election results somehow violates 3 U. S. C. §5; whether that court's construction of the state statutory provisions governing contests impermissibly

changes a state law from what the State's legislature has provided, in violation of Article II, §1, cl. 2, of the national Constitution; and whether the manner of interpreting markings on disputed ballots failing to cause machines to register votes for President (the undervote ballots) violates the equal protection or due process guaranteed by the Fourteenth Amendment. None of these issues is difficult to describe or to resolve.

A

The 3 U. S. C. §5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U. S. C. §15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to §5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of §5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress.

B

The second matter here goes to the State Supreme Court's interpretation of certain terms in the state statute governing election "contests," Fla. Stat. §102.168 (2000); there is no question here about the state court's interpretation of the related provisions dealing with the antecedent process of "protesting" particular vote counts, §102.166, which was involved in the previous case, *Bush* v. *Palm Beach County Canvassing Board*. The issue is whether the judgment of the state supreme court has displaced the state legislature's provisions for election contests: is the law as declared by the court different from

the provisions made by the legislature, to which the national Constitution commits responsibility for determining how each State's Presidential electors are chosen? See U. S. Const., Art. II, §1, cl. 2. Bush does not, of course, claim that any judicial act interpreting a statute of uncertain meaning is enough to displace the legislative provision and violate Article II; statutes require interpretation, which does not without more affect the legislative character of a statute within the meaning of the Constitution. Brief for Petitioners 48, n. 22, in *Bush* v. *Palm Beach County Canvassing Bd., et al.*, 531 U. S. ___ (2000). What Bush does argue, as I understand the contention, is that the interpretation of §102.168 was so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing new law untethered to the legislative act in question.

The starting point for evaluating the claim that the Florida Supreme Court's interpretation effectively rewrote §102.168 must be the language of the provision on which Gore relies to show his right to raise this contest: that the previously certified result in Bush's favor was produced by "rejection of a number of legal votes sufficient to change or place in doubt the result of the election." Fla. Stat. §102.168(3)(c) (2000). None of the state court's interpretations is unreasonable to the point of displacing the legislative enactment quoted. As I will note below, other interpretations were of course possible, and some might have been better than those adopted by the Florida court's majority; the two dissents from the majority opinion of that court and various briefs submitted to us set out alternatives. But the majority view is in each instance within the bounds of reasonable interpretation, and the law as declared is consistent with Article II.

1. The statute does not define a "legal vote," the rejection of which may affect the election. The State Supreme Court was therefore required to define it, and in doing

that the court looked to another election statute, §101.5614(5), dealing with damaged or defective ballots, which contains a provision that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by a canvassing board." The court read that objective of looking to the voter's intent as indicating that the legislature probably meant "legal vote" to mean a vote recorded on a ballot indicating what the voter intended. *Gore* v. *Harris*, __ So. 2d __ (slip op., at 23–25) (Dec. 8, 2000). It is perfectly true that the majority might have chosen a different reading. See, *e.g.*, Brief for Respondent Harris et al. 10 (defining "legal votes" as "votes properly executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places"). But even so, there is no constitutional violation in following the majority view; Article II is unconcerned with mere disagreements about interpretive merits.

2. The Florida court next interpreted "rejection" to determine what act in the counting process may be attacked in a contest. Again, the statute does not define the term. The court majority read the word to mean simply a failure to count. ____ So. 2d, at___ (slip op., at 26–27). That reading is certainly within the bounds of common sense, given the objective to give effect to a voter's intent if that can be determined. A different reading, of course, is possible. The majority might have concluded that "rejection" should refer to machine malfunction, or that a ballot should not be treated as "reject[ed]" in the absence of wrongdoing by election officials, lest contests be so easy to claim that every election will end up in one. Cf. *id.*, at ____ (slip op., at 48) (Wells, C. J., dissenting). There is, however, nothing nonjudicial in the Florida majority's more hospitable reading.

3. The same is true about the court majority's understanding of the phrase "votes sufficient to change or place

in doubt" the result of the election in Florida. The court held that if the uncounted ballots were so numerous that it was reasonably possible that they contained enough "legal" votes to swing the election, this contest would be authorized by the statute.[1] While the majority might have thought (as the trial judge did) that a probability, not a possibility, should be necessary to justify a contest, that reading is not required by the statute's text, which says nothing about probability. Whatever people of good will and good sense may argue about the merits of the Florida court's reading, there is no warrant for saying that it transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the "legislature" within the meaning of Article II.

In sum, the interpretations by the Florida court raise no substantial question under Article II. That court engaged in permissible construction in determining that Gore had instituted a contest authorized by the state statute, and it proceeded to direct the trial judge to deal with that contest in the exercise of the discretionary powers generously conferred by Fla. Stat. §102.168(8) (2000), to "fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." As JUSTICE GINSBURG has persuasively explained in her own dissenting opinion, our customary respect for state interpretations of state law counsels against rejection of

[1] When the Florida court ruled, the totals for Bush and Gore were then less than 1,000 votes apart. One dissent pegged the number of uncounted votes in question at 170,000. *Gore* v. *Harris*, *supra*, __ So. 2d __ , (slip op., at 66) (opinion of Harding, J.). Gore's counsel represented to us that the relevant figure is approximately 60,000, Tr. of Oral Arg. 62, the number of ballots in which no vote for President was recorded by the machines.

the Florida court's determinations in this case.

C

It is only on the third issue before us that there is a meritorious argument for relief, as this Court's *Per Curiam* opinion recognizes. It is an issue that might well have been dealt with adequately by the Florida courts if the state proceedings had not been interrupted, and if not disposed of at the state level it could have been considered by the Congress in any electoral vote dispute. But because the course of state proceedings has been interrupted, time is short, and the issue is before us, I think it sensible for the Court to address it.

Petitioners have raised an equal protection claim (or, alternatively, a due process claim, see generally *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982)), in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts. It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as "hanging" or "dimpled" chads). See, *e.g.,* Tr., at 238–242 (Dec. 2–3, 2000) (testimony of Palm Beach County Canvassing Board Chairman Judge Charles Burton describing varying standards applied to imperfectly punched ballots in Palm Beach County during precertification manual recount); *id.,* at 497–500 (similarly describing varying standards applied in Miami-Dade County); Tr.

of Hearing 8–10 (Dec. 8, 2000) (soliciting from county canvassing boards proposed protocols for determining voters' intent but declining to provide a precise, uniform standard). I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.

In deciding what to do about this, we should take account of the fact that electoral votes are due to be cast in six days. I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.

Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18. Although one of the dissenting justices of the State Supreme Court estimated that disparate standards potentially affected 170,000 votes, *Gore* v. *Harris*, *supra*, ___ So. 2d, at ___ (slip op., at 66), the number at issue is significantly smaller. The 170,000 figure apparently represents all uncounted votes, both undervotes (those for which no Presidential choice was recorded by a machine) and overvotes (those rejected because of votes for more than one candidate). Tr. of Oral Arg. 61–62. But as JUSTICE BREYER has pointed out, no showing has been made of legal overvotes uncounted, and counsel for Gore made an uncontradicted representation to the Court that the statewide total of undervotes is about 60,000. *Id.*, at 62. To recount these manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the oppor-

tunity to try to count all disputed ballots now.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 00–949

GEORGE W. BUSH, ET AL., PETITIONERS *v.*
ALBERT GORE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

[December 12, 2000]

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, and with whom JUSTICE SOUTER and JUSTICE BREYER join as to Part I, dissenting.

I

The CHIEF JUSTICE acknowledges that provisions of Florida's Election Code "may well admit of more than one interpretation." *Ante*, at 3. But instead of respecting the state high court's province to say what the State's Election Code means, THE CHIEF JUSTICE maintains that Florida's Supreme Court has veered so far from the ordinary practice of judicial review that what it did cannot properly be called judging. My colleagues have offered a reasonable construction of Florida's law. Their construction coincides with the view of one of Florida's seven Supreme Court justices. *Gore* v. *Harris*, __ So. 2d __, __ (Fla. 2000) (slip op., at 45–55) (Wells, C. J., dissenting); *Palm Beach County Canvassing Bd.* v. *Harris*, __ So. 2d __, __ (Fla. 2000) (slip op., at 34) (on remand) (confirming, 6–1, the construction of Florida law advanced in *Gore*). I might join THE CHIEF JUSTICE were it my commission to interpret Florida law. But disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated. There is no cause here to believe that the

members of Florida's high court have done less than "their mortal best to discharge their oath of office," *Sumner* v. *Mata*, 449 U. S. 539, 549 (1981), and no cause to upset their reasoned interpretation of Florida law.

This Court more than occasionally affirms statutory, and even constitutional, interpretations with which it disagrees. For example, when reviewing challenges to administrative agencies' interpretations of laws they implement, we defer to the agencies unless their interpretation violates "the unambiguously expressed intent of Congress." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984). We do so in the face of the declaration in Article I of the United States Constitution that "All legislative Powers herein granted shall be vested in a Congress of the United States." Surely the Constitution does not call upon us to pay more respect to a federal administrative agency's construction of federal law than to a state high court's interpretation of its own state's law. And not uncommonly, we let stand state-court interpretations of *federal* law with which we might disagree. Notably, in the habeas context, the Court adheres to the view that "there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [federal law] than his neighbor in the state courthouse.'" *Stone* v. *Powell*, 428 U. S. 465, 494, n. 35 (1976) (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus For State Prisoners, 76 Harv. L. Rev. 441, 509 (1963)); see *O'Dell* v. *Netherland*, 521 U. S. 151, 156 (1997) ("[T]he *Teague* doctrine validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.") (citing *Butler* v. *McKellar*, 494 U. S. 407, 414 (1990)); O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 Wm. & Mary

L. Rev. 801, 813 (1981) ("There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions.").

No doubt there are cases in which the proper application of federal law may hinge on interpretations of state law. Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court. In the Contract Clause case, *General Motors Corp.* v. *Romein*, 503 U. S. 181 (1992), for example, we said that although "ultimately we are bound to decide for ourselves whether a contract was made," the Court "accord[s] respectful consideration and great weight to the views of the State's highest court." *Id.*, at 187 (citation omitted). And in *Central Union Telephone Co.* v. *Edwardsville*, 269 U. S. 190 (1925), we upheld the Illinois Supreme Court's interpretation of a state waiver rule, even though that interpretation resulted in the forfeiture of federal constitutional rights. Refusing to supplant Illinois law with a federal definition of waiver, we explained that the state court's declaration "should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it." *Id.*, at 195.[1]

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[1] See also *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1032, n. 18 (1992) (South Carolina could defend a regulatory taking "if an *objectively reasonable application* of relevant precedents [by its courts] would exclude . . . beneficial uses in the circumstances in which the land is presently found"); *Bishop* v. *Wood*, 426 U. S. 341, 344–345 (1976) (deciding whether North Carolina had created a property interest cognizable under the Due Process Clause by reference to state law as interpreted by the North Carolina Supreme Court). Similarly, in *Gurley* v. *Rhoden*, 421 U. S. 200 (1975), a gasoline retailer claimed that due process entitled him to deduct a state gasoline excise tax in computing the amount of his sales subject to a state sales tax, on the

In deferring to state courts on matters of state law, we appropriately recognize that this Court acts as an " 'outside[r]' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers* v. *Schein*, 416 U. S. 386, 391 (1974). That recognition has sometimes prompted us to resolve doubts about the meaning of state law by certifying issues to a State's highest court, even when federal rights are at stake. Cf. *Arizonans for Official English* v. *Arizona,* 520 U. S. 43, 79 (1997) ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court."). Notwithstanding our authority to decide issues of state law underlying federal claims, we have used the certification devise to afford state high courts an opportunity to inform us on matters of their own State's law because such restraint "helps build a cooperative judicial federalism." *Lehman Brothers*, 416 U. S., at 391.

Just last Term, in *Fiore* v. *White*, 528 U. S. 23 (1999), we took advantage of Pennsylvania's certification procedure. In that case, a state prisoner brought a federal habeas action claiming that the State had failed to prove an essential element of his charged offense in violation of the Due Process Clause. *Id.*, at 25–26. Instead of resolving the state-law question on which the federal claim de-

grounds that the legal incidence of the excise tax fell on his customers and that he acted merely as a collector of the tax. The Mississippi Supreme Court held that the legal incidence of the excise tax fell on petitioner. Observing that "a State's highest court is the final judicial arbiter of the meaning of state statutes," we said that "[w]hen a state court has made its own definitive determination as to the operating incidence, . . . [w]e give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *Id.*, at 208.

pended, we certified the question to the Pennsylvania Supreme Court for that court to "help determine the proper state-law predicate for our determination of the federal constitutional questions raised." *Id.*, at 29; *id.*, at 28 (asking the Pennsylvania Supreme Court whether its recent interpretation of the statute under which Fiore was convicted "was always the statute's meaning, even at the time of Fiore's trial"). THE CHIEF JUSTICE's willingness to *reverse* the Florida Supreme Court's interpretation of Florida law in this case is at least in tension with our reluctance in *Fiore* even to interpret Pennsylvania law before seeking instruction from the Pennsylvania Supreme Court. I would have thought the "cautious approach" we counsel when federal courts address matters of state law, *Arizonans*, 520 U. S., at 77, and our commitment to "build[ing] cooperative judicial federalism," *Lehman Brothers*, 416 U. S., at 391, demanded greater restraint.

Rarely has this Court rejected outright an interpretation of state law by a state high court. *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch 603 (1813), *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958), and *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), cited by THE CHIEF JUSTICE, are three such rare instances. See *ante*, at 4, 5, and n. 2. But those cases are embedded in historical contexts hardly comparable to the situation here. *Fairfax's Devisee*, which held that the Virginia Court of Appeals had misconstrued its own forfeiture laws to deprive a British subject of lands secured to him by federal treaties, occurred amidst vociferous States' rights attacks on the Marshall Court. G. Gunther & K. Sullivan, Constitutional Law 61–62 (13th ed. 1997). The Virginia court refused to obey this Court's *Fairfax's Devisee* mandate to enter judgment for the British subject's successor in interest. That refusal led to the Court's pathmarking decision in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816). *Patterson*, a case decided three months after *Cooper* v. *Aaron*,

358 U. S. 1 (1958), in the face of Southern resistance to the civil rights movement, held that the Alabama Supreme Court had irregularly applied its own procedural rules to deny review of a contempt order against the NAACP arising from its refusal to disclose membership lists. We said that "our jurisdiction is not defeated if the nonfederal ground relied on by the state court is without any fair or substantial support." 357 U. S., at 455. *Bouie*, stemming from a lunch counter "sit-in" at the height of the civil rights movement, held that the South Carolina Supreme Court's construction of its trespass laws– criminalizing conduct not covered by the text of an otherwise clear statute– was "unforeseeable" and thus violated due process when applied retroactively to the petitioners. 378 U. S., at 350, 354.

THE CHIEF JUSTICE's casual citation of these cases might lead one to believe they are part of a larger collection of cases in which we said that the Constitution impelled us to train a skeptical eye on a state court's portrayal of state law. But one would be hard pressed, I think, to find additional cases that fit the mold. As JUSTICE BREYER convincingly explains, see *post*, at 5–9 (dissenting opinion), this case involves nothing close to the kind of recalcitrance by a state high court that warrants extraordinary action by this Court. The Florida Supreme Court concluded that counting every legal vote was the overriding concern of the Florida Legislature when it enacted the State's Election Code. The court surely should not be bracketed with state high courts of the Jim Crow South.

THE CHIEF JUSTICE says that Article II, by providing that state legislatures shall direct the manner of appointing electors, authorizes federal superintendence over the relationship between state courts and state legislatures, and licenses a departure from the usual deference we give to state court interpretations of state law. *Ante*, at 5 ("To

attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II."). The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments. See U. S. Const., Art. III; The Federalist No. 78 (A. Hamilton). In light of the constitutional guarantee to States of a "Republican Form of Government," U. S. Const., Art. IV, §4, Article II can hardly be read to invite this Court to disrupt a State's republican regime. Yet THE CHIEF JUSTICE today would reach out to do just that. By holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, THE CHIEF JUSTICE contradicts the basic principle that a State may organize itself as it sees fit. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").[2] Article II does not call for the scrutiny undertaken by this Court.

The extraordinary setting of this case has obscured the

[2] Even in the rare case in which a State's "manner" of making and construing laws might implicate a structural constraint, Congress, not this Court, is likely the proper governmental entity to enforce that constraint. See U. S. CONST., amend. XII; 3 U. S. C. §§1–15; cf. *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565, 569 (1916) (treating as a nonjusticiable political question whether use of a referendum to override a congressional districting plan enacted by the state legislature violates Art. I, §4); *Luther* v. *Borden*, 7 How. 1, 42 (1849).

ordinary principle that dictates its proper resolution: Federal courts defer to state high courts' interpretations of their state's own law. This principle reflects the core of federalism, on which all agree. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Saenz* v. *Roe*, 526 U. S. 489, 504, n. 17 (1999) (citing *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring)). THE CHIEF JUSTICE's solicitude for the Florida Legislature comes at the expense of the more fundamental solicitude we owe to the legislature's sovereign. U. S. Const., Art. II, §1, cl. 2 ("Each *State* shall appoint, in such Manner as the Legislature *thereof* may direct," the electors for President and Vice President) (emphasis added); *ante*, at 1–2 (STEVENS, J., dissenting).[3] Were the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court.

II

I agree with JUSTICE STEVENS that petitioners have not presented a substantial equal protection claim. Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world, one in

[3] "[B]ecause the Framers recognized that state power and identity were essential parts of the federal balance, see The Federalist No. 39, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province. The Constitution . . . grants States certain powers over the times, places, and manner of federal elections (subject to congressional revision), Art. I, §4, cl. 1 . . . , and allows States to appoint electors for the President, Art. II, §1, cl. 2." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 841–842 (1995) (KENNEDY, J., concurring).

which thousands of votes have not been counted. I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount. See, *e.g.*, *McDonald* v. *Board of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969) (even in the context of the right to vote, the state is permitted to reform " 'one step at a time' ") (quoting *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955)).

Even if there were an equal protection violation, I would agree with JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER that the Court's concern about "the December 12 deadline," *ante*, at 12, is misplaced. Time is short in part because of the Court's entry of a stay on December 9, several hours after an able circuit judge in Leon County had begun to superintend the recount process. More fundamentally, the Court's reluctance to let the recount go forward— despite its suggestion that "[t]he search for intent can be confined by specific rules designed to ensure uniform treatment," *ante*, at 8— ultimately turns on its own judgment about the practical realities of implementing a recount, not the judgment of those much closer to the process.

Equally important, as JUSTICE BREYER explains, *post*, at 12 (dissenting opinion), the December 12 "deadline" for bringing Florida's electoral votes into 3 U. S. C. §5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress *must* count unless both Houses find that the votes "ha[d] not been . . . regularly given." 3 U. S. C. §15. The statute identifies other significant dates. See, *e.g.*, §7 (specifying December 18 as the date electors "shall meet and give their votes"); §12 (specifying "the fourth Wednesday in December"— this year, December 27— as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of

state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes. §15.

The Court assumes that time will not permit "orderly judicial review of any disputed matters that might arise." *Ante*, at 12. But no one has doubted the good faith and diligence with which Florida election officials, attorneys for all sides of this controversy, and the courts of law have performed their duties. Notably, the Florida Supreme Court has produced two substantial opinions within 29 hours of oral argument. In sum, the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency of the United States.

I dissent.

SUPREME COURT OF THE UNITED STATES

No. 00–949

GEORGE W. BUSH, ET AL., PETITIONERS *v.*
ALBERT GORE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

[December 12, 2000]

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join except as to Part I–A–1, and with whom JUSTICE SOUTER joins as to Part I, dissenting.

The Court was wrong to take this case. It was wrong to grant a stay. It should now vacate that stay and permit the Florida Supreme Court to decide whether the recount should resume.

I

The political implications of this case for the country are momentous. But the federal legal questions presented, with one exception, are insubstantial.

A

1

The majority raises three Equal Protection problems with the Florida Supreme Court's recount order: first, the failure to include overvotes in the manual recount; second, the fact that *all* ballots, rather than simply the undervotes, were recounted in some, but not all, counties; and third, the absence of a uniform, specific standard to guide the recounts. As far as the first issue is concerned, petitioners presented no evidence, to this Court or to any Florida court, that a manual recount of overvotes would identify additional legal votes. The same is true of the second, and, in addition, the majority's reasoning would

seem to invalidate any state provision for a manual recount of individual counties in a statewide election.

The majority's third concern does implicate principles of fundamental fairness. The majority concludes that the Equal Protection Clause requires that a manual recount be governed not only by the uniform general standard of the "clear intent of the voter," but also by uniform subsidiary standards (for example, a uniform determination whether indented, but not perforated, "undervotes" should count). The opinion points out that the Florida Supreme Court ordered the inclusion of Broward County's undercounted "legal votes" even though those votes included ballots that were not perforated but simply "dimpled," while newly recounted ballots from other counties will likely include only votes determined to be "legal" on the basis of a stricter standard. In light of our previous remand, the Florida Supreme Court may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II. However, since the use of different standards could favor one or the other of the candidates, since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary judicial review, and since the relevant distinction was embodied in the order of the State's highest court, I agree that, in these very special circumstances, basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem. In light of the majority's disposition, I need not decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.

2

Nonetheless, there is no justification for the majority's remedy, which is simply to reverse the lower court and halt the recount entirely. An appropriate remedy would

be, instead, to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting *all* undercounted votes in Florida, including those from Broward, Volusia, Palm Beach, and Miami-Dade Counties, whether or not previously recounted prior to the end of the protest period, and to do so in accordance with a single-uniform substandard.

The majority justifies stopping the recount entirely on the ground that there is no more time. In particular, the majority relies on the lack of time for the Secretary to review and approve equipment needed to separate undervotes. But the majority reaches this conclusion in the absence of *any* record evidence that the recount could not have been completed in the time allowed by the Florida Supreme Court. The majority finds facts outside of the record on matters that state courts are in a far better position to address. Of course, it is too late for any such recount to take place by December 12, the date by which election disputes must be decided if a State is to take advantage of the safe harbor provisions of 3 U. S. C. §5. Whether there is time to conduct a recount prior to December 18, when the electors are scheduled to meet, is a matter for the state courts to determine. And whether, under Florida law, Florida could or could not take further action is obviously a matter for Florida courts, not this Court, to decide. See *ante*, at 13 *(per curiam)*.

By halting the manual recount, and thus ensuring that the uncounted legal votes will not be counted under any standard, this Court crafts a remedy out of proportion to the asserted harm. And that remedy harms the very fairness interests the Court is attempting to protect. The manual recount would itself redress a problem of unequal treatment of ballots. As JUSTICE STEVENS points out, see *ante*, at 4 and n. 4 (STEVENS, J., dissenting opinion), the ballots of voters in counties that use punch-card systems are more likely to be disqualified than those in counties

using optical-scanning systems. According to recent news reports, variations in the undervote rate are even more pronounced. See Fessenden, No-Vote Rates Higher in Punch Card Count, N. Y. Times, Dec. 1, 2000, p. A29 (reporting that 0.3% of ballots cast in 30 Florida counties using optical-scanning systems registered no Presidential vote, in comparison to 1.53% in the 15 counties using Votomatic punch card ballots). Thus, in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair. Nor do I understand why the Florida Supreme Court's recount order, which helps to redress this inequity, must be entirely prohibited based on a deficiency that could easily be remedied.

B

The remainder of petitioners' claims, which are the focus of the CHIEF JUSTICE's concurrence, raise no significant federal questions. I cannot agree that the CHIEF JUSTICE's unusual review of state law in this case, see *ante*, at 5–8 (GINSBURG, J., dissenting opinion), is justified by reference either to Art. II, §1, or to 3 U. S. C. §5. Moreover, even were such review proper, the conclusion that the Florida Supreme Court's decision contravenes federal law is untenable.

While conceding that, in most cases, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law," the concurrence relies on some combination of Art. II, §1, and 3 U. S. C. §5 to justify the majority's conclusion that this case is one of the few in which we may lay that fundamental principle aside. *Ante*, at 2 (Opinion of REHNQUIST, C. J. The concurrence's primary foundation for this conclusion rests on an appeal

to plain text: Art. II, §1's grant of the power to appoint Presidential electors to the State "Legislature." *Ibid.* But neither the text of Article II itself nor the only case the concurrence cites that interprets Article II, *McPherson* v. *Blacker*, 146 U. S. 1 (1892), leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors. See *id.*, at 41 (specifically referring to state constitutional provision in upholding state law regarding selection of electors). Nor, as JUSTICE STEVENS points out, have we interpreted the Federal constitutional provision most analogous to Art. II, §1– Art. I, §4– in the strained manner put forth in the concurrence. *Ante*, at 1–2 and n. 1 (dissenting opinion).

The concurrence's treatment of §5 as "inform[ing]" its interpretation of Article II, §1, cl. 2, *ante*, at 3 (REHNQUIST, C. J., concurring), is no more convincing. The CHIEF JUSTICE contends that our opinion in *Bush* v. *Palm Beach County Canvassing Bd., ante,* p. ____, *(per curiam) (Bush I),* in which we stated that "a legislative wish to take advantage of [§5] would counsel against" a construction of Florida law that Congress might deem to be a change in law, *id.*, (slip op. at 6), now means that *this Court* "must ensure that post-election state court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by §5." *Ante*, at 3. However, §5 is part of the rules that govern Congress' recognition of slates of electors. Nowhere in *Bush I* did we establish that *this Court* had the authority to enforce §5. Nor did we suggest that the permissive "counsel against" could be transformed into the mandatory "must ensure." And nowhere did we intimate, as the concurrence does here, that a state court decision that threatens the safe harbor provision of §5 does so in violation of Article II. The concurrence's logic turns the presumption that legislatures would wish to take advantage of §5's "safe harbor" provision into a

mandate that trumps other statutory provisions and overrides the intent that the legislature *did* express.

But, in any event, the concurrence, having conducted its review, now reaches the wrong conclusion. It says that "the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II." *Ante,* at 4–5 (REHNQUIST, C. J, concurring). But what precisely is the distortion? Apparently, it has three elements. First, the Florida court, in its earlier opinion, changed the election certification date from November 14 to November 26. Second, the Florida court ordered a manual recount of "undercounted" ballots that could not have been fully completed by the December 12 "safe harbor" deadline. Third, the Florida court, in the opinion now under review, failed to give adequate deference to the determinations of canvassing boards and the Secretary.

To characterize the first element as a "distortion," however, requires the concurrence to second-guess the way in which the state court resolved a plain conflict in the language of different statutes. Compare Fla. Stat. §102.166 (2001) (foreseeing manual recounts during the protest period) with §102.111 (setting what is arguably too short a deadline for manual recounts to be conducted); compare §102.112(1) (stating that the Secretary "may" ignore late returns) with §102.111(1) (stating that the Secretary "shall" ignore late returns). In any event, that issue no longer has any practical importance and cannot justify the reversal of the different Florida court decision before us now.

To characterize the second element as a "distortion" requires the concurrence to overlook the fact that the inability of the Florida courts to conduct the recount on time is, in significant part, a problem of the Court's own making. The Florida Supreme Court thought that the recount could be completed on time, and, within hours, the

Florida Circuit Court was moving in an orderly fashion to meet the deadline. This Court improvidently entered a stay. As a result, we will never know whether the recount could have been completed.

Nor can one characterize the third element as "impermissibl[e] distort[ing]" once one understands that there are two sides to the opinion's argument that the Florida Supreme Court "virtually eliminated the Secretary's discretion." *Ante,* at 9 (REHNQUIST, C. J, concurring). The Florida statute in question was amended in 1999 to provide that the "grounds for contesting an election" include the "rejection of a number of legal votes sufficient to . . . place in doubt the result of the election." Fla. Stat. §§102.168(3), (3)(c) (2000). And the parties have argued about the proper meaning of the statute's term "legal vote." The Secretary has claimed that a "legal vote" is a vote "properly executed in accordance with the instructions provided to all registered voters." Brief for Respondent Harris et al. 10. On that interpretation, punchcard ballots for which the machines cannot register a vote are not "legal" votes. *Id.*, at 14. The Florida Supreme Court did not accept her definition. But it had a reason. Its reason was that a different provision of Florida election laws (a provision that addresses damaged or defective ballots) says that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by the canvassing board" (adding that ballots should not be counted "if it is impossible to determine the elector's choice"). Fla. Stat. §101.5614(5) (2000). Given this statutory language, certain roughly analogous judicial precedent, *e.g., Darby* v. *State ex rel. McCollough,* 75 So. 411 (Fla. 1917) *(per curiam),* and somewhat similar determinations by courts throughout the Nation, see cases cited *infra,* at 9, the Florida Supreme Court concluded that the term "legal vote" means a vote recorded on a ballot that clearly reflects what the voter intended. *Gore* v. *Harris,*

___ So. 2d ___, ___ (2000) (slip op., at 19). That conclusion differs from the conclusion of the Secretary. But nothing in Florida law requires the Florida Supreme Court to accept as determinative the Secretary's view on such a matter. Nor can one say that the Court's ultimate determination is so unreasonable as to amount to a constitutionally "impermissible distort[ion]" of Florida law.

The Florida Supreme Court, applying this definition, decided, on the basis of the record, that respondents had shown that the ballots undercounted by the voting machines contained enough "legal votes" to place "the results" of the election "in doubt." Since only a few hundred votes separated the candidates, and since the "undercounted" ballots numbered tens of thousands, it is difficult to see how anyone could find this conclusion unreasonable-however strict the standard used to measure the voter's "clear intent." Nor did this conclusion "strip" canvassing boards of their discretion. The boards retain their traditional discretionary authority during the protest period. And during the contest period, as the court stated, "the Canvassing Board's actions [during the protest period] may constitute evidence that a ballot does or does not qualify as a legal vote." *Id.*, at *13. Whether a local county canvassing board's discretionary judgment during the protest period not to conduct a manual recount will be set aside during a contest period depends upon whether a candidate provides additional evidence that the rejected votes contain enough "legal votes" to place the outcome of the race in doubt. To limit the local canvassing board's discretion in this way is not to eliminate that discretion. At the least, one could reasonably so believe.

The statute goes on to provide the Florida circuit judge with authority to "fashion such orders as he or she deems necessary to ensure that each allegation . . . is *investigated, examined, or checked*, . . . and to provide any relief appropriate." Fla. Stat. §102.168(8) (2000) (emphasis

added). The Florida Supreme Court did just that. One might reasonably disagree with the Florida Supreme Court's interpretation of these, or other, words in the statute. But I do not see how one could call its plain language interpretation of a 1999 statutory change so misguided as no longer to qualify as judicial interpretation or as a usurpation of the authority of the State legislature. Indeed, other state courts have interpreted roughly similar state statutes in similar ways. See, *e.g.*, *In re Election of U. S. Representative for Second Congressional Dist.*, 231 Conn. 602, 621, 653 A. 2d 79, 90–91 (1994) ("Whatever the process used to vote and to count votes, differences in technology should not furnish a basis for disregarding the bedrock principle that the purpose of the voting process is to ascertain the intent of the voters"); *Brown* v. *Carr*, 130 W. Va. 401, 460, 43 S. E.2d 401, 404–405 (1947) ("[W]hether a ballot shall be counted . . . depends on the intent of the voter Courts decry any resort to technical rules in reaching a conclusion as to the intent of the voter").

I repeat, where is the "impermissible" distortion?

II

Despite the reminder that this case involves "an election for the President of the United States," *ante*, at 1 (REHNQUIST, C. J., concurring), no preeminent legal concern, or practical concern related to legal questions, required this Court to hear this case, let alone to issue a stay that stopped Florida's recount process in its tracks. With one exception, petitioners' claims do not ask us to vindicate a constitutional provision designed to protect a basic human right. See, e.g., *Brown* v. *Board of Education*, 347 U. S. 483 (1954). Petitioners invoke fundamental fairness, namely, the need for procedural fairness, including finality. But with the one "equal protection" exception, they rely upon law that focuses, not upon that basic need, but upon

the constitutional allocation of power. Respondents invoke a competing fundamental consideration— the need to determine the voter's true intent. But they look to state law, not to federal constitutional law, to protect that interest. Neither side claims electoral fraud, dishonesty, or the like. And the more fundamental equal protection claim might have been left to the state court to resolve if and when it was discovered to have mattered. It could still be resolved through a remand conditioned upon issuance of a uniform standard; it does not require reversing the Florida Supreme Court.

Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.

The Constitution and federal statutes themselves make clear that restraint is appropriate. They set forth a road map of how to resolve disputes about electors, even after an election as close as this one. That road map foresees resolution of electoral disputes by *state* courts. See 3 U. S. C. §5 (providing that, where a "State shall have provided, by laws enacted prior to [election day], for its final determination of any controversy or contest concerning the appointment of . . . electors . . . by *judicial* or other methods," the subsequently chosen electors enter a safe harbor free from congressional challenge). But it nowhere provides for involvement by the United States Supreme Court.

To the contrary, the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. A federal statute, the Electoral Count Act, enacted after the close 1876 Hayes-Tilden Presidential election, specifies that, after States have tried to resolve disputes (through "judicial" or other means), Congress is

the body primarily authorized to resolve remaining disputes. See Electoral Count Act of 1887, 24 Stat. 373, 3 U. S. C. §§5, 6, and 15.

The legislative history of the Act makes clear its intent to commit the power to resolve such disputes to Congress, rather than the courts:

> "The two Houses are, by the Constitution, authorized to make the count of electoral votes. They can only count legal votes, and in doing so must determine, from the best evidence to be had, what are legal votes The power to determine rests with the two Houses, and there is no other constitutional tribunal." H. Rep. No. 1638, 49th Cong., 1st Sess., 2 (1886) (report submitted by Rep. Caldwell, Select Committee on the Election of President and Vice-President).

The Member of Congress who introduced the Act added:

> "The power to judge of the legality of the votes is a necessary consequent of the power to count. The existence of this power is of absolute necessity to the preservation of the Government. The interests of all the States in their relations to each other in the Federal Union demand that the ultimate tribunal to decide upon the election of President should be a constituent body, in which the States in their federal relationships and the people in their sovereign capacity should be represented." 18 Cong. Rec. 30 (1886).
>
> "Under the Constitution who else could decide? Who is nearer to the State in determining a question of vital importance to the whole union of States than the constituent body upon whom the Constitution has devolved the duty to count the vote?" *Id.*, at 31.

The Act goes on to set out rules for the congressional determination of disputes about those votes. If, for example, a state submits a single slate of electors, Congress must count those votes unless both Houses agree that the votes "have not been . . . regularly given." 3 U. S. C. § 15. If, as occurred in 1876, one or more states submits two sets of electors, then Congress must determine whether a slate has entered the safe harbor of §5, in which case its votes will have "conclusive" effect. *Ibid.* If, as also occurred in 1876, there is controversy about "which of two or more of such State authorities . . . is the lawful tribunal" authorized to appoint electors, then each House shall determine separately which votes are "supported by the decision of such State so authorized by its law." *Ibid.* If the two Houses of Congress agree, the votes they have approved will be counted. If they disagree, then "the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted." *Ibid.*

Given this detailed, comprehensive scheme for counting electoral votes, there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. Nor, for that matter, is there any reason to that think the Constitution's Framers would have reached a different conclusion. Madison, at least, believed that allowing the judiciary to choose the presidential electors "was out of the question." Madison, July 25, 1787 (reprinted in 5 Elliot's Debates on the Federal Constitution 363 (2d ed. 1876)).

The decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will

is what elections are about.

Moreover, Congress was fully aware of the danger that would arise should it ask judges, unarmed with appropriate legal standards, to resolve a hotly contested Presidential election contest. Just after the 1876 Presidential election, Florida, South Carolina, and Louisiana each sent two slates of electors to Washington. Without these States, Tilden, the Democrat, had 184 electoral votes, one short of the number required to win the Presidency. With those States, Hayes, his Republican opponent, would have had 185. In order to choose between the two slates of electors, Congress decided to appoint an electoral commission composed of five Senators, five Representatives, and five Supreme Court Justices. Initially the Commission was to be evenly divided between Republicans and Democrats, with Justice David Davis, an Independent, to possess the decisive vote. However, when at the last minute the Illinois Legislature elected Justice Davis to the United States Senate, the final position on the Commission was filled by Supreme Court Justice Joseph P. Bradley.

The Commission divided along partisan lines, and the responsibility to cast the deciding vote fell to Justice Bradley. He decided to accept the votes by the Republican electors, and thereby awarded the Presidency to Hayes.

Justice Bradley immediately became the subject of vociferous attacks. Bradley was accused of accepting bribes, of being captured by railroad interests, and of an eleventh-hour change in position after a night in which his house "was surrounded by the carriages" of Republican partisans and railroad officials. C. Woodward, Reunion and Reaction 159–160 (1966). Many years later, Professor Bickel concluded that Bradley was honest and impartial. He thought that "'the great question' for Bradley was, in fact, whether Congress was entitled to go behind election returns or had to accept them as certified by state authorities," an "issue of principle." The Least Dangerous Branch

185 (1962). Nonetheless, Bickel points out, the legal question upon which Justice Bradley's decision turned was not very important in the contemporaneous political context. He says that "in the circumstances the issue of principle was trivial, it was overwhelmed by all that hung in the balance, and it should not have been decisive." *Ibid.*

For present purposes, the relevance of this history lies in the fact that the participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process. And the Congress that later enacted the Electoral Count Act knew it.

This history may help to explain why I think it not only legally wrong, but also most unfortunate, for the Court simply to have terminated the Florida recount. Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the "strangeness of the issue," its "intractability to principled resolution," its "sheer momentousness, . . . which tends to unbalance judicial judgment," and "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from." Bickel, *supra*, at 184. Those characteristics mark this case.

At the same time, as I have said, the Court is not acting to vindicate a fundamental constitutional principle, such as the need to protect a basic human liberty. No other strong reason to act is present. Congressional statutes tend to obviate the need. And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were

marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, "John Marshall has made his decision; now let him enforce it!" Loth, Chief Justice John Marshall and The Growth of the American Republic 365 (1948). But we do risk a self-inflicted wound — a wound that may harm not just the Court, but the Nation.

I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary "check upon our own exercise of power," "our own sense of self-restraint." *United States* v. *Butler,* 297 U. S. 1, 79 (1936) (Stone, J., dissenting). Justice Brandeis once said of the Court, "The most important thing we do is not doing." Bickel, *supra*, at 71. What it does today, the Court should have left undone. I would repair the damage done as best we now can, by permitting the Florida recount to continue under uniform standards.

I respectfully dissent.